81-331

Office Supreme Court, U.S.
FILED
AUG 17 1981
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

# Supreme Court of the United States

October Term, 1981

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA

and

THE UNITED CONTRACTORS ASSOCIATION,

*Petitioners,*

*v.*

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, et al.,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOHN J. MCALEESE, JR.*
THOMAS J. MCGOLDRICK
LOUIS A. MINELLA
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, PA 19004
(215) 667-7080

*Attorneys for Petitioners*

CUNNIFF, BRAY & MCALEESE
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, Pennsylvania 19004

*Of Counsel*

* *Counsel of Record for Petitioners*

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

## QUESTIONS PRESENTED FOR REVIEW

I. Did not the courts below err in ruling that a contractor trade association, which negotiated with an operating engineers union an agreement containing a racially-neutral hiring-hall provision but which itself never hired operating engineers, is nonetheless vicariously liable for the union's discrimination in the operation of the hiring hall, in breach of the agreement and in violation of 42 U. S. C. § 1981, where the association had no contact with the hiring hall after the negotiations and neither knew nor had reason to know of the union's discrimination?

II. Did not the courts below err in making a contractor trade association subject to a far-reaching mandatory injunction to remedy the union's discrimination and also in imposing on that association a substantial financial obligation in connection with that injunction?

## PARTIES IN THE COURT OF APPEALS

The parties in the Court of Appeals were:

1. Raymond Williams
   Willie McKay
   Marion J. Eaddy
   Randolph Hughes, Jr.
   Arel Brownlee
   William Bostic
   Kenneth Howard
   Alpha Christmas
   Ronald Richardson
   Clarence Winder
   Ronald Crawford
   Frank Gilchrist

who were plaintiffs below, respondents in this Court, and class representatives of more than 1,000 persons;

2. The Commonwealth of Pennsylvania which was a plaintiff below and a respondent in this Court;

3. Local 542, International Union of Operating Engineers which was a defendant below but not a petitioner to this Court;

4. Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania and the State of Delaware which was a defendant below but not a petitioner to this Court;

5. General Building Contractors Association, Inc., Contractors Association of Eastern Pennsylvania, and United Contractors Association which were defendants below and separate petitioners to this Court;

6. Glasgow, Inc. which was a defendant below, separate petitioners to this Court, and class representative of approximately 1,400 contractors; and

7. Bechtel Power Corporation and United Engineers & Constructors, Inc. which were class members but not parties below and separate petitioners to this Court.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | i |
| PARTIES IN THE COURT OF APPEALS | ii |
| TABLE OF AUTHORITIES | iv |
| OPINIONS IN THE COURTS BELOW | 2 |
| JURISDICTION OF THIS COURT | 2 |
| THE STATUTE INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| REASONS FOR ALLOWANCE OF THE WRIT | 6 |
| I. This Case Presents Important Questions of Federal Law Which Have a Profound Impact Not Only on the Construction Industry But Also on all Those Industries Throughout the United States Which Utilize Hiring Halls | 6 |
| II. The Decisions Below Conflict With Decisions of Other Federal Courts of Appeals, As Well As Applicable Decisions of This Court | 10 |
| CONCLUSION | 13 |

## TABLE OF AUTHORITIES

**Cases:** Page


Allen v. Pipefitters Local Union No. 208, 56 F. R. D. 473 (D. Colo. 1972) ..... 12

Chicano Police Officer's Ass'n. v. Stover, 552 F. 2d 918 (10th Cir. 1977) ..... 10, 11

City Bank v. Rivera Davila, 438 F. 2d 1367 (1st Cir. 1971) 13

City of Memphis v. Greene, 49 U. S. L. W. 4389 (U. S. 1981) 8

City of Milwaukee v. Saxbe, 546 F. 2d 693 (7th Cir. 1976) 10

County of Los Angeles v. Davis, 440 U. S. 625 (1979) .... 8

Craig v. County of Los Angeles, 626 F. 2d 659 (9th Cir. 1980) ..... 11

Des Vergnes v. Seekonk Water Dist., 601 F. 2d 9 (1st Cir. 1979) ..... 10

Detroit Police Officers Ass'n. v. Young, 608 F. 2d 671 (6th Cir. 1979) ..... 10

Donnell v. General Motors Corp., 576 F. 2d 1291 (8th Cir. 1978) ..... 10

Grigsby v. North Mississippi Medical Center, Inc., 586 F. 2d 457 (5th Cir. 1978) ..... 10

Guardians Ass'n. v. Civil Service Comm'n., 633 F. 2d 232 (2d Cir. 1980) ..... 10, 11

Houston Chapter, Associated General Contractors, 143 NLRB 409 (1963), *enf'd*, 349 F. 2d 449 (5th Cir. 1965); *cert. denied*, 382 U. S. 1026 (1966) ..... 6

International Brotherhood of Teamsters v. United States, 431 U. S. 324 (1977) ..... 8

Johnson v. Alexander, 572 F. 2d 1219 (8th Cir.), *cert. denied*, 439 U. S. 986 (1978) ..... 10

Local 357, International Brotherhood of Teamsters v. NLRB, 365 U. S. 667 (1961) ..... 6

## TABLE OF AUTHORITIES (Continued)

**Cases (Continued):** Page


Lummus Co. v. NLRB, 339 F. 2d 728 (D. C. Cir. 1964) .... 11
McFadden v. Baltimore Steamship Trade Association, 8 BNA FEP Cases 391 (D. Md. 1972) ..... 12
Milliken v. Bradley, 418 U. S. 717 (1974) ..... 12
Monell v. Department of Social Services of the City of New York, 436 U. S. 658 (1978) ..... 8, 9
Morrison-Knudsen Co., Inc. v. NLRB, 275 F. 2d 914 (2d Cir. 1960), *cert. denied*, 366 U. S. 909 (1961) ..... 11
NLRB v. Master Stevedores Association, 418 F. 2d 140 (5th Cir. 1969) ..... 11
Northwest Airlines, Inc. v. Transport Workers Union, 101 S. Ct. 1571 (1981) ..... 9
Rios v. Enterprise Ass'n. Steamfitters, 400 F. Supp. 993 (S. D. N. Y. 1975), *aff'd. sub nom.* EEOC v. Enterprise Ass'n Steamfitters, 542 F. 2d 579 (2d Cir. 1976), *cert. denied*, 430 U. S. 911 (1977) ..... 13
Swan v. Charlotte-Mecklenburg Board of Educ., 402 U. S. 1 (1971) ..... 12
Vogler v. McCarty, Inc., 294 F. Supp. 368 (E. D. La. 1968), *aff'd sub nom.*, Heat & Frost Insulators & Asbestos Workers v. Vogler, 407 F. 2d 1047 (5th Cir. (1969) .. 12
Washington v. Davis, 426 U. S. 229 (1976) .....8, 10, 11


**Statutes:**


Civil Rights Act of 1964, Title VII ..... 8
28 U. S. C. § 1254(1) ..... 2
42 U. S. C.:
§ 1981 .....*passim*
§ 1983 ..... 8, 9


**Authorities:**


Restatement (2d) of Agency, § 214 ..... 9, 10

No.

IN THE

# Supreme Court of the United States

October Term, 1981

THE CONTRACTORS ASSOCIATION
OF EASTERN PENNSYLVANIA

AND

THE UNITED CONTRACTORS ASSOCIATION,
*Petitioners,*

*v.*

COMMONWEALTH OF PENNSYLVANIA
and RAYMOND WILLIAMS, et al.,
*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Contractors Association of Eastern Pennsylvania ("CAEP") and the United Contractors Association ("UCA") petition this Court to review the judgment of the United States Court of Appeals for the Third Circuit entered on May 19, 1981.

## OPINIONS IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Third Circuit for which review is sought is reported officially at 648 F. 2d 923. That decision affirmed a judgment of the United States District Court for the Eastern District of Pennsylvania, the opinion for which is officially reported at 469 F. Supp. 329.

## JURISDICTION OF THIS COURT

The judgment of the Court of Appeals was entered on May 19, 1981.

This Court has jurisdiction by virtue of 28 U. S. C. § 1254(1).

## THE STATUTE INVOLVED

The following statute, 42 U. S. C. § 1981, is involved in this case:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to the like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

## STATEMENT OF THE CASE

This petition seeks review of a decision by the United States Court of Appeals for the Third Circuit sitting *en banc* which decision affirmed by an *equally-divided* vote a decision by the United States District Court for the Eastern District of Pennsylvania (JA. 8; 9-212). These decisions, which were rendered under 42 U. S. C. § 1981, were that several contractor trade associations, which themselves had never hired any operating engineers, were vicariously liable to a plaintiff class of more than 1,000 minority persons seeking work as operating engineers. The basis for the decisions was that the associations negotiated an agreement with Local 542 of the International Union Operating Engineers ("Local 542") containing a racially-neutral hiring-hall provision which when implemented was operated in a racially-discriminatory fashion by Local 542 in breach of the agreement.[1] (JA. 30).

CAEP and UCA are two of the contractor trade associations which were found to be vicariously liable. CAEP is a non-profit corporation whose membership includes approximately eighty of the 1,400 employers encompassed within the defendant employer class. One of the specific purposes of the CAEP is to negotiate collective bargaining agreements with various construction unions on behalf of its membership. UCA at all times pertinent hereto was a loose-knit, unincorporated contractor association whose membership included approximately twenty-five of the above-described 1400 employers.[2] The UCA assigned the

1. The Third Circuit also affirmed by *unanimous* vote holdings of liability for racial discrimination under Title VII of the Civil Rights Act of 1964 and 42 U. S. C. § 1981 against Local 542 and its apprenticeship program, which holdings this Court will not be requested to review.

2. A good portion of the members of the loosely knit UCA were also members of the more formalized CAEP.

bargaining rights of its members to the CAEP[3] (JA. 29-30).

In 1961, Local 542 set out to impose on all contractors working within its geographic jurisdiction (eastern half of Pennsylvania and Delaware) an exclusive hiring-hall referral system wherein all employer requests for operating engineers would have to be processed through the Local 542's hiring hall. The CAEP and UCA initially resisted Local 542's lawful negotiating demand. However, after a destructive ten-week strike by Local 542 against the members of the CAEP and UCA, an exclusive hiring-hall provision was agreed to which is racially neutral on its face (JA. 23, 30).

The major thrust of this case was not that compliance with the hiring-hall provision caused discrimination since the provision was neutral on its face, but rather that Local 542 *intentionally circumvented* the hiring-hall language and effected racially discriminatory job referrals (JA. 120). Although the courts below found that Local 542 had violated § 1981 by its *failure to comply* with the racially-neutral hiring-hall referral provision, they found that the plaintiffs had *failed to prove* by a preponderance of the evidence that CAEP or the UCA either engaged in Local 542's intentional discrimination or even was or should have been aware of it (JA. 168, 195, 198). Notwithstanding the foregoing, the courts below held the CAEP and UCA vicariously liable:

> *Nevertheless, I find that* the . . . *associations [including Petitioners]* are injunctively liable to the Plaintiff class under § 1981 *as a result of their contractual relationship to and use of* a hiring hall system which

---

3. Unlike the CAEP, the UCA has never had any staff employee.

> in practice effectuated intentional discrimination, *whether or not* the . . . *associations knew or should have known* (JA. 168).
> (Emphasis supplied.)

Since CAEP and UCA never employed an operating engineer, neither has ever used the Local 542 hiring hall system. In fact, since negotiation of the original provision, the CAEP and UCA have not had any contact with the hiring hall. Moreover, CAEP and UCA never have had any contractual relationship with Local 542. They, on behalf of their members, simply negotiated racially-neutral collective bargaining agreements with Local 542.

The injunction issued against CAEP and UCA is a far-reaching mandatory injunction, the terms of which are to be in existence for a five-year period. In addition, CAEP and UCA are obliged to pay ten percent (10%) each of all monetary expenses incurred as a result of the ongoing injunctive relief. Although the first year of the injunction is not yet complete, the defendants have already been required by the district court to expend approximately $190,000 under the injunction.

## REASONS FOR ALLOWANCE OF THE WRIT

### I. This Case Presents Important Questions of Federal Law Which Have a Profound Impact Not Only on the Construction Industry But Also on All Those Industries Throughout the United States Which Utilize Hiring Halls.

Hiring halls are used in many industries throughout the United States. For example, they are common in the sprawling maritime industry, as well as being widely used in the giant construction industry. This Court has recognized the practical necessities and potential benefits to employers and employees alike in *Local 357, International Brotherhood of Teamsters v. NLRB*, 365 U. S. 667 (1961). In that case, this Court ruled that a hiring-hall provision which is facially neutral is a lawful contract provision.

With the question of the legality of hiring-hall provisions thus settled, the national labor policy then developed to a point where an employer or its bargaining representative, such as the CAEP, which is faced with a collective bargaining demand for a hiring-hall provision is under substantial pressure to accede to that demand, especially after the ruling which confirmed that exclusive hiring halls are *not only lawful* but are *mandatory* subjects of collective bargaining.[4] Therefore, a union may bargain a demand for an exclusive hiring hall to impasse and strike therefor if it wishes to bring into operation the full pressure of its economic force.

The decisions by the courts below which are the subject of this petition plainly clash with this established national labor policy by discouraging any employer or its

4. *Houston Chapter, Associated General Contractors*, 143 NLRB 409 (1963), *enf'd*, 349 F. 2d 449 (5th Cir. 1965), *cert. denied*, 382 U. S. 1026 (1966).

bargaining representative from agreeing to use a hiring hall. By imposing, as the courts below did, what amounts to *strict liability* on the CAEP and UCA which did not know or have reason to know of Local 542's discrimination, and which became essentially a non-participatory third party after negotiating the original and lawful agreement, they give a strong inducement to any employer or its bargaining representative faced with a demand for a hiring hall to avoid it almost at any cost. The principal alternative would be exposure to a risk of staggering and unknown financial liability. Thus, the unavoidable result of the decisions by the courts below is inconsistency, if not outright conflict, in major national labor policies, as well as uncertainty, conflict, and even labor strife in those industries which over the years have utilized hiring halls. This Court, therefore, should take jurisdiction of and review this case with a purpose of rectifying the departure by the courts below from settled federal principles which have a profound impact on such a substantial portion of the public.

In addition, the decisions by the courts below obviously raise important questions under a federal statute in which this Court has shown great interest, 42 U. S. C. § 1981. Since the decisions at bar clearly recognize that CAEP and UCA neither knew nor had reason to know of Local 542's discrimination, and in fact had *no contact* whatever with the hiring hall after negotiation of the racially-neutral agreement, it follows inexorably that CAEP or UCA could not have had any discriminatory motive or intent. Therefore, it is fair and indeed accurate to conclude that liability under § 1981 was imposed on CAEP and UCA without proof that they intended to discriminate. In fact, the courts below ruled that § 1981 does not require such proof.

The question of whether § 1981 requires proof of discriminatory intent—in contra-distinction to Title VII of the Civil Rights Act of 1964[5]—has twice before been before this Court in *City of Memphis v. Greene*, 49 U. S. L. W. 4389 (U. S. 1981) and *County of Los Angeles v. Davis*, 440 U. S. 625 (1979). However, those cases were disposed of on other grounds. In no case has this precise issue been dealt with on the merits by this Court.

Furthermore, and as will be demonstrated in more detail below, the rulings by the courts below that § 1981 does not require proof of discriminatory intent are in direct conflict with decisions of six other circuits, as well as being in conflict with the principles established by this Court in *Washington v. Davis*, 426 U. S. 229 (1976).

Further to the construction of § 1981—and disregarding for the moment the question of discriminatory intent—the case at bar raises the very important threshold question of whether there can be *any* vicarious liability *at all* under § 1981 and if so under what circumstances. This Court ruled in *Monell v. Department of Social Services of the City of New York*, 436 U. S. 658 (1978) that municipal authorities cannot be held vicariously liable under 42 U. S. C. § 1983. More specifically, in *Monell*, in the concurring opinion of Mr. Justice Powell, it is stated that § 1983 contains ". . . a limitation of the statutory ambit to actual wrongdoers, i.e., a rejection of *respondeat superior* or any other principle of vicarious liability." *Monell, supra*, 436 U. S. at 707. It seemingly follows from *Monell's* limitation of liability under § 1983 to actual wrongdoers that § 1981 as well will not support vicarious liability. A reading of the two provisions *in pari materia* on the issue of vicarious liability is compelled both by this Court's opinion in *Monell* and by the basic

5. *International Brotherhood of Teamsters v. United States*, 431 U. S. 324 (1977).

purpose of § 1981, which is, as set forth heretofore, to prohibit only purposeful discrimination. In this regard, a major factor in the decision of *Monell* was Congress' rejection after heated debate of the proposed Sherman Amendment. That amendment would have made municipalities vicariously liable for the unlawful acts of its citizens. Obviously, the Reconstruction Congress was opposed in 1871 to vicarious liability in connection with § 1983. It is fair to infer that the Reconstruction Congress had no different view where, only a year before in 1870, it reenacted the related statute, § 1981.

In addition to the factors pointed out above, the courts below invoked the doctrine of *respondeat superior* and imposed vicarious liability on CAEP and UCA even though it was quite clear that they never hired an operating engineer and they neither controlled nor had the right to control the operation of the Local 542 hiring hall. In fact, the courts below never set forth any analysis as to why they were holding CAEP and UCA liable. As a reserve theory for imposing vicarious liability, the courts below looked to the elusive principle of non-delegable duty, which is articulated in Restatement (2d) of Agency, § 214, and then read this into § 1981. Even if the limits of § 1981 are not sufficiently circumscribed to rule out vicarious liability against the trade associations here involved, then this Court should settle the very significant question of federal law as to precisely when such liability is justified. In that regard, the plain departure by the courts below from the well-settled principles of *respondeat superior* in their construction of § 1981 clearly was erroneous and is in direct conflict with the principles of federal statutory construction set forth by this Court in *Northwest Airlines, Inc. v. Transport Workers Union*, 101 S. Ct. 1571 (1981).

**II. The Decisions Below Conflict With Decisions of Other Federal Courts of Appeals, as Well as Applicable Decisions of This Court.**

The courts below held squarely that § 1981 does not require proof of discriminatory intent. By so doing, the Third Circuit placed itself in direct conflict with decisions in six other federal circuits and with dicta in at least two more. *City of Milwaukee v. Saxbe,* 546 F. 2d 693 (7th Cir. 1976); *Chicano Police Officer's Ass'n. v. Stover,* 552 F. 2d 918 (10th Cir. 1977); *Johnson v. Alexander,* 572 F. 2d 1219 (8th Cir.), *cert. denied,* 439 U. S. 986 (1978); *Donnell v. General Motors Corp.,* 576 F. 2d 1291 (8th Cir. 1978); *Guardians Ass'n. v. Civil Service Comm'n.,* 633 F. 2d 232 (2d Cir. 1980); *Grigsby v. North Mississippi Medical Center, Inc.,* 586 F. 2d 457 (5th Cir. 1978); *Detroit Police Officers' Ass'n. v. Young,* 608 F. 2d 671 (6th Cir. 1979); *Des Vergnes v. Seekonk Water Dist.,* 601 F. 2d 9 (1st Cir. 1979). In these cases, it is correctly recognized that § 1981, unlike Title VII, requires more proof than simply proof of disparate impact. Instead, they state, § 1981 requires for its violation a motive or intent to discriminate. This becomes critical in the case at bar when it is remembered that CAEP and UCA neither knew nor had any reason to know of Local 542's discriminatory referrals, let alone their having the requisite motive or intent. Therefore, this Court should now resolve this major conflict of circuits and provide the definitive construction of § 1981 which is so much needed.

In addition, the rulings of the courts below that proof of discriminatory intent is unnecessary for a violation of § 1981 are in conflict with the principles announced by this court in *Washington v. Davis,* 426 U. S. 229 (1976). Although that case sets forth the standard of proof to show a violation of the Equal Protection Clause, the mes-

sage that it bears regarding § 1981 appears clear. Although it is true that several circuits have recognized that *Washington v. Davis* strongly suggests that § 1981 requires proof of discriminatory intent,[6] as stated above it is time that this Court clearly confirms that very important rule of federal law.

Further to the conflict of circuits created by the decisions of the courts below in reaching the rather astounding decisions that they did, the courts below relied upon a line of cases under the National Labor Relations Act as amended. In this line, they relied most heavily upon *Morrison-Knudsen Co., Inc. v. NLRB*, 275 F. 2d 914 (2nd Cir. 1960), *cert. denied*, 366 U. S. 909 (1961) for the proposition that an employer who uses a union hiring hall may be liable for the union's discrimination on account of union membership without regard to whether the employer knew or should have known of the union's discrimination. Initially, *Morrison-Knudsen* in no way relates to a third-party trade association. Furthermore, although it is clear that the courts below misinterpreted *Morrison-Knudsen*,[7] that is unimportant to the instant issue of the granting of this petition because other circuits which have considered the question require knowledge as a predicate for any liability for union discrimination. *E.g.*, *NLRB v. Master Stevedores Association*, 418 F. 2d 140 (5th Cir. 1969) and *Lummus Co. v. NLRB*, 339 F. 2d 728

6. *Craig v. County of Los Angeles*, 626 F. 2d 659 (9th Cir. 1980); *Guardians Ass'n. v. Civil Service Comm'n.*, 633 F. 2d 232 (2d Cir. 1980); *Chicano Police Officer's Ass'n. v. Stover*, 552 F. 2d 918 (10th Cir. 1977).

7. As the Fifth Circuit correctly recognized, in *Morrison-Knudsen* the employer had knowledge of the union's discrimination. *NLRB v. Master Stevedores Assoc.*, 418 F. 2d 140, 142 (5th Cir. 1969).

(D. C. Cir. 1964). Therefore, when the Third Circuit ruled that it is immaterial whether CAEP or UCA knew or had reason to know of Local 542's discrimination, it drew itself into direct conflict with at least the Fifth and the District of Columbia Circuits on this important question of federal law. As with others, this conflict should now be resolved by this Court.

In addition, the decisions of the courts below appear to conflict even with the few cases which deal with employer or association liability for union discrimination on the basis of race in a hiring hall setting. *Vogler v. McCarty, Inc.*, 294 F. Supp. 368, 374-75 (E. D. La. 1968), *aff'd sub nom. Heat & Frost Insulators & Asbestos Workers v. Vogler*, 407 F. 2d 1047 (5th Cir. 1969); *Allen v. Pipefitters Local Union No. 208*, 56 F. R. D. 473 (D. Colo. 1972); and *McFadden v. Baltimore Steamship Trade Association*, 8 BNA FEP Cases 391, 393 (D. Md. 1972). In each of these cases, the employers and associations were held *not* liable, while the courts never even inquired into the question of knowledge by the employers or associations.

Finally, it is also noted that monetary "injunctive" relief ordered against the Petitioners by the district court and affirmed by Third Circuit conflicts with well-established principles of this Court. As previously noted, there simply is no basis in equity for the district court's imposition of such an extreme monetary remedy against the Petitioners herein. As this Court has emphasized, the scope of the equitable remedy must be determined by the nature of the violation. *Swan v. Charlotte-Mecklenburg Board of Educ.*, 402 U. S. 1 (1971); *Milliken v. Bradley*, 418 U. S. 717 (1974). Similarly, the imposition by the courts below of a monetary "injunction" against the non-discriminating Petitioner trade associations herein is in conflict with the decisions of at least two other circuit courts.

*City Bank v. Rivera Davila*, 438 F. 2d 1367, 1371 (1st Cir. 1971); *Rios v. Enterprise Ass'n Steamfitters*, 400 F. Supp. 993 (S. D. N. Y. 1975), *aff'd sub nom. EEOC v. Enterprise Ass'n Steamfitters*, 542 F. 2d 579 (2d Cir. 1976), *cert. denied*, 430 U. S. 911 (1977).

## CONCLUSION

Since this case presents questions in respect of important matters of federal law which have a wide impact, and presents conflicts with the decisions of at least six other circuits, this Court should grant this petition, take jurisdiction of this case, and review the questions presented.

Respectfully submitted,

JOHN J. MCALEESE, JR.
THOMAS J. MCGOLDRICK
LOUIS A. MINELLA
CUNNIFF, BRAY & MCALEESE
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, PA 19004
*Attorneys for Petitioners*

Office - Supreme Court, U.S.
FILED
DEC 7 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-331

IN THE

# Supreme Court of the United States

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA
and
THE UNITED CONTRACTORS ASSOCIATION,
*Petitioners,*

*v.*

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS, et al.,
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

## BRIEF ON BEHALF OF PETITIONERS THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA AND THE UNITED CONTRACTORS ASSOCIATION

JOHN J. MCALEESE, JR.*
THOMAS J. MCGOLDRICK
LOUIS A. MINELLA
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, PA 19004
(215) 667-7080
*Attorneys for Petitioners*

CUNNIFF, BRAY & MCALEESE
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, Pennsylvania 19004
*Of Counsel*

*Counsel of Record for Petitioners

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-5711

## QUESTIONS PRESENTED

1. Whether 42 U. S. C. § 1981 requires for its violation proof of an intent to discriminate by the party against whom liability is sought to be imposed?

2. Whether, under 42 U. S. C. § 1981, a collective bargaining representative for employers may be liable for discrimination by a union of operating engineers where that representative neither knew nor had reason to know of the union's discriminatory conduct?

3. Whether, under 42 U. S. C. § 1981, there can be vicarious liability by virtue of *respondeat superior* where there was no service performed for the entity held liable and where that entity does not have either control or the right to control?

4. Whether 42 U. S. C. § 1981 creates a non-delegable duty to insure that another who performs no service refrains from discrimination?

5. Whether under the circumstances of this case a non-wrongdoing association which does not employ operating engineers can be subjected to a far-reaching injunction which imposes, *inter alia*, substantial financial obligations on the association but which was issued only because of discriminatory conduct by a union?

## PARTIES IN THE COURT OF APPEALS *

The parties in the court of appeals were:

*Plaintiff-Appellees*:

(a) the Commonwealth of Pennsylvania; and,

(b) twelve individuals (Messrs. Raymond Williams; Wille McKay; Marion J. Eaddy; Randolph Hughes, Jr.; Arel Brownlee; William Bostic; Kenneth Howard; Alpha Christmas; Ronald Richardson; Clarence Winder; Ronald Crawford; Frank Gilchrist) on their own behalf and as representatives of a class of similarly situated individuals.

*Named Defendant-Appellants*:

(a) Local 542, International Union of Operating Engineers, AFL-CIO;

(b) the Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania, and the State of Delaware;

(c) four contractor associations: The Contractors Association of Eastern Pennsylvania, the United Contractors Association, the General Building Contractors Association, Inc., and Pennsylvania Excavating Contractors Association on behalf of themselves and as representatives of a defendant class of employer associations (all but the Pennsylvania Excavating Contractors Association are petitioners in this Court); [1] and

---

* All references to the Appendix to Petitions for Certiorari will be designated by "PA. —"; all references to the Joint Appendix on Writ of Certiorari will be designated by "JA. —".

1. The Pennsylvania Excavating Contractors Association dissolved in 1972 (PA. 29). In fashioning its injunctive decree, although the district court imposed a specific financial obligation of 10% on each of the other three named associations, it allocated no percentage of the total costs under the decree to the PECA.

(d) Glasgow, Inc. on behalf of itself and as the representative of a defendant class of employers.

*Non-Party Members of Defendant Class-Appellants*:

(a) Bechtel Power Corporation; and,

(b) United Engineers & Constructors, Inc.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES IN THE COURT OF APPEALS | ii |
| TABLE OF AUTHORITIES | vi |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| THE STATUTE INVOLVED | 2 |
| STATEMENT OF THE CASE | 3 |
| SUMMARY OF ARGUMENT | 11 |
| ARGUMENT | 15 |
| I. The NLRA Cases Cited By the District Court Do Not Support the Imposition of Liability Upon the CAEP or UCA and Instead Require That They Be Held Not Liable | 17 |
| II. The Title VII Seniority-System Cases Relied Upon By the District Court are Inapposite | 20 |
| III. Under Settled Legal Principles of *Respondeat Superior*, the Relationship Between the Associations and the Union is Insufficient to Support the Imposition of Vicarious Liability | 21 |
| IV. The Concept of a Non-Delegable Duty Under § 1981 Is Not Applicable to the Associations | 24 |
| V. Since the Associations Did Not Engage in Any Intentional Racially-Discriminatory Conduct, They Cannot Be Held Liable Under § 1981 | 25 |

## TABLE OF CONTENTS (Continued)


Page

A. The Relationship Between § 1981 and the Equal Protection Clause of the Fourteenth Amendment Requires the Conclusion that for § 1981 to be Violated There Must be a Finding of Discriminatory Intent ..... 27

B. The Language and Legislative History of § 1981, as Well as Prior Decisions of this Court, Require a Determination that § 1981 Is Directed Only Toward Acts of Purposeful Discrimination ..... 29

C. Application of Other Than the Intentional Discrimination Standard to § 1981 Would Substantially Undermine Both *Washington v. Davis* and the Title VII Enforcement Scheme ..... 31

VI. In Ordering a Sweeping Remedy Imposing Obligations Far Beyond Those Necessary to Correct the Precise Violation Found, the Courts Below Exceeded the Scope of Remedial Authority ..... 33

CONCLUSION ..... 39

## TABLE OF AUTHORITIES


| Cases: | Page |
|---|---|
| Alexander v. Gardner-Denver Co., 425 U. S. 36 (1974) .... | 32 |
| Buchanan v. Warley, 245 U. S. 60 (1917) ..... | 28 |
| Carey v. Greyhound Bus Co., 500 F. 2d 1372 (5th Cir. 1974) ..... | 20 |
| Chicano Police Officer's Ass'n v. Stover, 552 F. 2d 918 (10th Cir. 1977) ..... | 26 |
| Cincinnati, No. 2 T. P. R. Co. v. Kentucky, 115 U. S. 321 (1885) ..... | 29 |
| City Bank v. Rivera Davila, 438 F. 2d 1367 (1st Cir. 1971) .. | 37 |
| City of Memphis v. Greene, — U. S. —, 101 S. Ct. 1584 (1981) .....29, 30 | |
| City of Milwaukee v. Saxbe, 546 F. 2d 693 (7th Cir. 1976) .. | 26 |
| Craig v. County of Los Angeles, 626 F. 2d 659 (9th Cir. 1980), *cert. denied*, — U. S. —, 101 S. Ct. 1364 (1981) ..... | 26 |
| Croker v. Boeing, — F. 2d —, 26 FEP Cases 1569 (3d Cir. 1981) .....26, 29, 30 | |
| Dayton Board of Education v. Brinkman, 433 U. S. 406 (1977) .....14, 35 | |
| Des Vernes v. Seekonk Water Dist., 601 F. 2d 9 (1st Cir. 1979) ..... | 26 |
| Detroit Police Officers' Ass'n v. Young, 608 F. 2d 671 (6th Cir. 1979), *cert. denied* — U. S. —, 101 S. Ct. 3079 (1981) ..... | 26 |
| Donnell v. General Motors Corp., 576 F. 2d 1292 (8th Cir. 1978) ..... | 26 |
| EEOC v. Enterprise Association Steamfitters, 542 F. 2d 579 (2d Cir. 1976), *cert. denied*, 430 U. S. 911 (1977) .... | 35 |
| EEOC v. International Union of Operating Engineers, Local 14, 553 F. 2d 251 (2d Cir. 1977) ..... | 35 |
| Griggs v. Duke Power Co., 401 U. S. 424 (1971) ..... | 31 |

## TABLE OF AUTHORITIES (Continued)

**Cases (Continued):** Page


Grigsby v. North Mississippi Medical Center, Inc., 586 F. 2d 457 (5th Cir. 1978) ..... 26

Guardians Ass'n v. Civil Service Comm'n, 633 F. 2d 232 (2d Cir. 1980), *petition for cert. filed*, 50 U. S. L. W. 3157 (U. S. Aug. 31, 1981) (Nos. 81-431, 432) .....26, 29, 30

Hurd v. Hodge, 334 U. S. 24 (1948) ..... 27

International Brotherhood of Teamsters v. U. S., 431 U. S. 324 (1977) .....12, 20

Johnson v. Alexander, 572 F. 2d 1219 (8th Cir.), *cert. denied*, 439 U. S. 986 (1978) ..... 26

Johnson v. Goodyear Tire & Rubber Co., 491 F. 2d 1364 (5th Cir. 1974) ..... 20

Johnson v. Railway Express Agency, Inc., 421 U. S. 454 (1975) ..... 32

Jones v. Alfred H. Mayer Co., 392 U. S. 409 (1968) .....28, 31

Kinsey v. First Regional Securities, Inc., 557 F. 2d 830 (D. C. Cir. 1977) ..... 26

Lummus Co. v. NLRB, 339 F. 2d 728 (D. C. Cir. 1964) .. 19

Mescall v. Burrus, 603 F. 2d 1266 (7th Cir. 1979) ..... 26

Milliken v. Bradley, 418 U. S. 717 (1974) ..... 35

Monell v. Department of Social Services of the City of New York, 436 U. S. 658 (1978) ..... 12

Morrison-Knudsen Co., Inc. v. NLRB, 275 F. 2d 914 (2d Cir. 1960), *cert. denied*, 366 U. S. 909 (1961) ..11, 17, 18, 19

Myers v. Gilman Paper Corp., 544 F. 2d 837 (5th Cir.), *cert. dismissed*, 434 U. S. 801 (1977) ..... 20

NLRB v. Master Stevedores Association of Texas, 418 F. 2d 140 (5th Cir. 1969) ..... 19

NLRB v. Southern Stevedoring and Contracting Co., 332 F. 2d 1017 (5th Cir. 1964) ..... 19

NLRB v. United States Steel Corp., 278 F. 2d 896 (3d Cir. 1960) ..... 18

## TABLE OF AUTHORITIES (Continued)


**Cases (Continued):** Page

Occidental Life Insurance Co. v. EEOC, 432 U. S. 355 (1977) ..... 32

Rios v. Enterprise Ass'n Steamfitters Local 638, 400 F. Supp. 933 (S. D. N. Y. 1975), *aff'd sub nom.*, EEOC v. Enterprise Ass'n Steamfitters, 542 F. 2d 579 (2d Cir. 1976), *cert. denied*, 430 U. S. 911 (1977) ..... 37

Rizzo v. Goode, 423 U. S. 362 (1976) ..... 35

Robinson v. Lorillard Corp., 444 F. 2d 791 (4th Cir.), *cert. dismissed*, 404 U. S. 1006 (1971) ..... 20

Runyon v. McCrary, 427 U. S. 160 (1976) .....27, 31

Sledge v. J. P. Stevens & Co., 585 F. 2d 625 (4th Cir. 1978) .. 35

Strauder v. West Virginia, 100 U. S. 303 (1879) ..... 28

Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971) ..... 35

Thomas v. Duralite Co., 386 F. Supp. 698 (D. N. J. 1974), *aff'd in part and rev'd in part*, 524 F. 2d 577 (3d Cir. 1975) ..... 37

Tillman v. Wheaton-Haven Recreation Ass'n., Inc., 410 U. S. 431 (1973) .....27, 28, 30

United States v. Wong Kim Ark, 169 U. S. 649 (1898) ..... 27

Washington v. Davis, 426 U. S. 229 (1976) .....13, 26, 29, 31

Williams v. DeKalb County, 582 F. 2d 2 (5th Cir. 1978) .. 26

## TABLE OF AUTHORITIES (Continued)


**Constitution and Statutes:** Page

The Fourteenth Amendment .....13, 27, 28, 29, 31
Civil Rights Act of 1866 [14 Stat. 27] .....27, 28, 30, 31
Civil Rights Act of 1964, Title VII, 42 U. S. C. § 2000e *et seq.* .....4, 12, 16, 18, 20, 21, 27, 30, 32
Revised Statutes § 1977 ..... 28
Voting Rights Act of 1870 [16 Stat. 144] .....27, 28
28 U. S. C. § 1254(1) ..... 2
29 U. S. C. §§ 158(a)(1) and (2) .....18, 23
42 U. S. C. § 1981 .....*passim*
42 U. S. C. § 1982 .....30, 31
42 U. S. C. § 1983 ..... 35

**Other Authorities:**

Restatement (2d) of Agency, § 1 ..... 18
Restatement (2d) of Agency, § 2(1) ..... 22
Restatement (2d) of Agency, § 214 .....13, 16, 24
Restatement (2d) of Agency, § 219 ..... 22
J. Pomeroy, Equity Jurisprudence § 1338 (5th ed. 1941) .. 35

No. 81-331

IN THE

# Supreme Court of the United States

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA

and

THE UNITED CONTRACTORS ASSOCIATION,

*Petitioners,*

*v.*

COMMONWEALTH OF PENNSYLVANIA, and RAYMOND WILLIAMS, et al.,

*Respondents.*

## BRIEF ON BEHALF OF PETITIONERS CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA AND UNITED CONTRACTORS ASSOCIATION

## OPINIONS BELOW

**District Court**

The opinion of the United States District Court for the Eastern District of Pennsylvania setting forth the findings of fact and conclusions of law respecting liability is officially reported at 469 F. Supp. 329 (PA. 9). The district court also issued a separate judgment and decree, which was accompanied by a supplemental opinion. The judgment and decree (PA. 228) is not officially reported. The supplemental opinion is officially reported at 488 F. Supp. 988 (PA. 213).

**Court of Appeals**

Argument on appeal was initially heard by a panel of three judges in the United States Court of Appeals for the Third Circuit. Before a decision was issued, the court ordered reargument *en banc*. Following reargument before six of the active judges, the judgment of the district court, because of an equally-divided vote, was affirmed. The one-sentence *per curiam* opinion of the court is officially reported at 648 F. 2d 923 (PA. 8).

## JURISDICTION

The judgment of the court of appeals was entered on May 19, 1981. A timely petition for a writ of certiorari was filed by Petitioners in No. 81-331 on August 17, 1981. On October 19, 1981, this Court granted the petition. This Court has jurisdiction by virtue of 28 U. S. C. § 1254(1).

## THE STATUTE INVOLVED

The following statute, 42 U. S. C. § 1981, is involved in this case:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to the like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

## STATEMENT OF THE CASE

This case involves an exclusive union hiring hall or referral system, which was conceived by Local 542, International Union of Operating Engineers, AFL-CIO ("Union") and imposed by it on construction contractors in collective bargaining. The jurisdiction of the Union is the eastern half of Pennsylvania and the State of Delaware. The specific provision relating to the referral system as it appears in the Union's collective bargaining agreement is racially neutral on its face and otherwise lawful (PA. 30).

This case was bifurcated for trial into liability and back-pay phases. The back-pay phase has not yet taken place. This case was tried as a class action both on the plaintiffs' side and on the defendants' side (PA. 17-18). The twelve individual black plaintiffs were certified as class representatives for persons similarly situated. Glasgow, Inc., the sole-named employer defendant, was ordered to act as class representative for all contractors (sometimes estimated at 1,400) who like Glasgow were required to use the Union's referral system. Likewise, the four named defendant contractor associations were ordered to act as class representatives for other associations who were involved in negotiations with the Union. These four associations are: the Contractors Association of Eastern Pennsylvania, which is a Pennsylvania non-profit corporation ("CAEP"); the United Contractors Association, a loosely-knit unincorporated contractor association ("UCA"); the General Building Contractors Association, Inc., which is a Pennsylvania non-profit corporation ("GBCA"); and the Pennsylvania Excavating Contractors Association ("PECA"), which dissolved in 1972 (PA. 14-15).

The district court, through the Honorable A. Leon Higginbotham, Jr., determined that defendant Union in-

tentionally operated its referral system in a racially-discriminatory fashion, in direct violation of its collective bargaining agreement and of 42 U. S. C. § 1981, as well as of Title VII of the Civil Rights Act of 1964 (PA. 120, 164-65).

The district court made no similar finding against any contractor who was legally bound to utilize the referral system or against any contractor association which had acted as a representative for employers in negotiations. In fact, the Court did not find that any contractor or association engaged in any conduct violative of 42 U. S. C. § 1981.[2] Rather, the district court held that the contractors who, because of their legal obligation to do so, used the Union's referral system and those contractor associations which engaged in negotiations with the Union were vicariously liable under 42 U. S. C. § 1981 for the Union's discriminatory conduct, notwithstanding its other findings that the contractors and the associations neither knew nor had reason to know of the Union's discriminatory conduct in breach of their agreement with it (PA. 168, 195-96, 198, 212).

The court of appeals, sitting *en banc*, affirmed unanimously the holding against the Union, but then divided equally on the issue of the liability of the contractors and associations, thereby affirming the district court. The *per curiam* opinion of the court of appeals announcing its equal division was one sentence in length (PA. 9).

Petitioners, CAEP and UCA, are two of the contractor trade associations which were found to be vicariously liable

2. The court below found that there was not before it any claim under Title VII against either the associations or Glasgow. This holding is implied in the opinion of the court below, and is fully supported by the uncontested fact that the associations and Glasgow were not parties to any charge before the Equal Employment Opportunity Commission, a prerequisite to an action in a federal court under Title VII (PA. 331).

under § 1981 for the discriminatory conduct of the Union. CAEP had a fluctuating membership during the period covered by this case which included approximately eighty to one hundred of the 1,400 employers encompassed within the defendant contractor class. One of the specific purposes of the CAEP is to negotiate collective bargaining agreements with various construction unions on behalf of its membership. UCA at all times pertinent hereto was a loosely-knit, unincorporated contractor association whose fluctuating membership included during the period in question approximately fourteen to twenty-eight of the above-described 1,400 employers.[3] The UCA never negotiated directly with the Union or any other union, but rather assigned the bargaining rights of its members to the CAEP[4] (PA. 29).

In 1961, the Union set out to impose on all contractors working within its geographic jurisdiction (eastern half of the Commonwealth of Pennsylvania and the entire State of Delaware) an exclusive hiring-hall referral system wherein all employer requests for job openings for operating engineers would have to be processed through one of the five Union hiring halls dispersed geographically within its work jurisdiction.[5]

Prior to 1961, any employer which had a collective bargaining agreement with the Union was free to obtain qualified operating engineers from any available source (PA. 23).

---

3. A good portion of the members of the loosely-knit UCA were also members of the more formalized CAEP.

4. Unlike the CAEP, the UCA has never had any staff employee.

5. Because of its expansive size, the Union is divided into five districts, and there is a separate hiring hall for each district. One covers the five-county Philadelphia area. Another covers the State of Delaware. The remaining three cover the other twenty-nine counties in eastern Pennsylvania (PA. 28-29).

In 1961, contract negotiations with the Union were taking place on several fronts throughout the Union's work jurisdiction. Included among these fronts were Delaware, where a Delaware contractors association was negotiating with the Union on behalf of contractors represented by it, and Philadelphia, where the CAEP and others were negotiating on behalf of the contractors represented by them. Although there was severe opposition to the Union's demand for an exclusive referral system, the associations were informed by the National Labor Relations Board that they, as representatives of employers, were subject to a legal duty to bargain in good faith with the Union in respect of this demand because it is a mandatory subject of bargaining (JA. 306). Finally, prior to May 1, 1961, the Delaware employers capitulated to the Union's demand for an exclusive referral system and directed their negotiating representative to agree to the Union's demand (JA. 306).

The persistence of the Union for the exclusive hiring hall provision beyond Delaware and the severe opposition of the Pennsylvania contractors, through their bargaining representatives, eventually were transformed into a bargaining impasse over the referral system issue. An economically debilitating strike, which, the district court characterized as "destructive", ensued. This strike, which began on May 1, 1961, lasted for ten weeks. In the face of this strike, and, as the district court found, with the "prospect of serious adverse economic consequences" if the strike continued and faced with the reality that the "Union would not compromise for any other hiring alternative," the Pennsylvania employers, including those represented in bargaining by the CAEP, finally surrendered to the Union's demand for its exclusive hiring-hall system (PA. 21, 23).

Essentially, the same scenario unfolded as the agreement negotiated in 1961 approached its April 30, 1963, expiration date. In negotiations for their next collective

bargaining agreement in 1963, the CAEP acting again as the bargaining representative for some of the employers, unsuccessfully attempted to remove the referral system from their agreement with the Union. Once again, however, the Union struck over this issue and after another serious and lengthy strike, the contractor employers were forced to continue with the hiring-hall provisions (JA. 310).[6]

At this juncture, it is most important to understand the following: (1) that the district court correctly found that the agreement's provision dealing with the hiring-hall system is on its face racially neutral; and (2) that the district court found that the Union's intentional discriminatory conduct in the actual operation of the referral system was *in violation of*, and *not in compliance with*, the rules spelled out in the collective bargaining agreement for operation of that racially-neutral system[7] (PA. 30). In fact, the district court had this to say concerning the Union's actual operation of the referral system:

> The union procedures in general constituted a motley fabric of arbitrary departures from the rules. I do not find that union's intentional discrimination was practiced in such a way as to exclude absolutely all minorities from entry or to deny absolutely all minorities from the benefits of employment. The gross disparities and other evidence are nevertheless persuasive that the union practiced intentional discrimination (PA. 120).

6. The 1961 basic contractual language governing the exclusive referral system has remained, without any substantive modification, in the Union's collective bargaining agreements continuously to the present date.

7. Briefly summarized, except for certain specific limited situations, the referral system under the agreement is basically a "FIFO" (first in, first out) system, provided the individual seeking referral asserts that he is able to operate the piece of equipment for which the contractor was requesting an operator.

As stated, the major thrust of plaintiffs' argument in the district court was not that compliance with the hiring-hall provision caused discrimination since the provision was, in fact, racially neutral on its face, but rather that the Union *intentionally circumvented* the hiring-hall language and, in doing so, effected racially discriminatory job referrals (PA. 120). Moreover, although the district court found that the Union had violated § 1981 by its *failure to comply* with the racially-neutral hiring-hall referral provision, it found that the plaintiffs had *failed to prove* by a preponderance of the evidence that the CAEP and the UCA either engaged in the Union's intentional discrimination or even were aware or should have been aware of it (PA. 168). Notwithstanding these now unchallenged findings, the district court held the CAEP and UCA to be vicariously liable:

> Nevertheless, I find that the contractors and *associations* [including Petitioners] are injunctively liable to the Plaintiff class under § 1981 as a result of their contractual relationship to and *use* of a hiring hall system which in practice effectuated intentional discrimination, whether or not the . . . *associations* knew or should have known.[8]

(PA. 168) (emphasis added).

Moreover, in reaching said conclusion, the district court even conceded that ". . . no case has been found which imposes civil rights liability on the employer or *association* in these precise circumstances. . . ." (PA. 169) (emphasis added).

8. The district court's finding that the associations were vicariously liable because they used the hiring-hall evidences the district court's misperception of the role played by the associations. Since the CAEP and UCA never employed any operating engineers, *neither has ever used* the Union's hiring-hall system. In fact, the CAEP and UCA have had no contact whatsoever with the actual operation of the hiring hall.

Immediately following the issuance of the opinion by the district court on January 2, 1979, CAEP and UCA, among others, requested the Union immediately to remove the referral-system provision from its collective bargaining agreement. In view of the content of said opinion, the purpose for this request was to terminate any potential future liability to the contractors as a result of their use of the referral system. When the Union refused to comply with the request, the grievance machinery of the collective bargaining agreement was invoked on behalf of the contractors. A final and binding decision by labor arbitrator Jay Kramer ruled that in view of the district court's decision, the contractor employers did not have any further obligation under the collective bargaining agreement to use the Union's referral system. Upon a motion made by the Union immediately following this arbitration decision, the district court overrode this ruling and enjoined the contractors to continue the use of the referral system, while imposing a racial quota on the referrals made by the Union (JA. 380-384).

In addition, in its judgment and decree, the district court mandated extensive and far-reaching five-year injunctive relief against all fourteen-hundred employers who, at any time from 1965 forward, utilized the Union's hiring hall for referral of operating engineers. This mandatory injunction required, *inter alia*, that all employers meet minority hiring quotas, that skills training and upgrading programs be implemented for minorities, and that a vast network for monitoring and auditing employer reporting of minority utilization also be implemented (PA. 234-35, 241-44, 247-50). Since neither CAEP nor UCA is an employer or participant in the hiring-hall process, neither was ordered to hire anyone and neither was ordered to cease any present or past activity. However, under subsequent

implementing provisions of said decree, the district court ordered the CAEP and UCA to pay 20% of the total expenses incurred as a result of the ongoing injunctive program ordered against the Union and all contractors with whom it had a collective bargaining relationship. Although the first year of this five-year injunction has only just been completed, the district court has already ordered the expenditure of approximately $200,000 to implement the injunctive relief [9] (PA. 285).

---

9. Moreover, in its judgment and decree, the district court also awarded reasonable attorneys' fees and costs to the named plaintiffs and Commonwealth (PA. 251). Counsel for the plaintiffs and Commonwealth have already requested the district court for an initial award of counsel fees for services through March, 1980, of over $1 million dollars and are seeking that said award be imposed jointly and severally among the six named defendants, including the CAEP and UCA.

## SUMMARY OF ARGUMENT

The CAEP,[10] a non-profit corporation association, represented employers in collective bargaining negotiations with the Union, which represented operating engineers. After an economically disastrous strike, the employers were forced to accede to the union's lawful bargaining demand for an exclusive hiring-hall referral system, the terms of which are racially neutral and otherwise lawful. In the implementation thereof, and without the knowledge of the CAEP or UCA, the Union, in violation of the referral-system rules, effected racial discrimination in referring operating engineers for work.

The court of appeals, by an equally-divided vote, affirmed *per curiam* without opinion the holding of the district court that the CAEP and UCA are vicariously liable under 42 U. S. C. § 1981 for the discriminatory conduct of the Union, despite a finding that the plaintiffs had failed to prove that either the CAEP or UCA intended to discriminate.

1. None of the many cases cited by the district court supports the imposition of liability on the associations. That court used a line of cases under the National Labor Relations Act, especially *Morrison-Knudsen Co., Inc. v. NLRB*, 275 F. 2d 914 (2d Cir. 1960), *cert. denied*, 366 U. S. 909 (1961), but misread them (PA. 169-73). This line of cases, when interpreted accurately, holds that an employer may not be held liable for hiring-hall discrimination (union-related, not racial) by a union if that employer did not have knowledge of the discrimination. Although these cases are irrelevant when analyzing the question of

10. Petitioner UCA, who also did not employ operating engineers, did not bargain with the Union. On request of the UCA, the CAEP acted as bargaining agent not only for those employers who requested it to act as their bargaining representative but also for those employers who had designated the UCA as their bargaining representative (PA. 29).

the liability of an association which never used or had any contact whatever with the operation of a particular hiring hall, since they require knowledge of the union discrimination, liability never could be imposed upon the CAEP or UCA in this case because of their lack of knowledge of the Union's discrimination.

2. The district court also erroneously relied upon a series of Title VII cases which held a union and an employer jointly liable for the racially-disparate impact of a facially-neutral seniority provision in a collective bargaining agreement (PA. 181-86). These cases, too, are easily distinguished. First, they do not involve liability of an association bargaining representative. They do involve liability of employers. Second, in these Title VII cases, the actionable discriminatory impact resulted from the performance of the terms of the collective bargaining agreement in the manner *intended;* however, in the case at bar, the discriminatory conduct which forms the basis for the district court's decision was itself a *violation* by the Union of the terms of a collective bargaining agreement. And, in any event, the continued vitality of these cases was removed by this Court's decision in *International Brotherhood of Teamsters v. United States,* 431 U. S. 324 (1977).

3. The district court incorrectly applied the doctrine of *respondeat superior* to reach its vicarious liability [11]

11. This case raises the threshold question of whether there can be any vicarious liability at all under § 1981. This Court ruled in *Monell v. Department of Social Services of the City of New York,* 436 U. S. 658 (1978) that municipal authorities cannot be held vicariously liable under 42 U. S. C. § 1983. More specifically, in *Monell,* in the concurring opinion of Mr. Justice Powell, it is stated that § 1983 contains "a limitation of the statutory ambit to actual wrongdoers, i.e., a rejection of *respondeat superior* or any other principle of vicarious liability." *Monell, supra,* 436 U. S. at 707. It seemingly follows from *Monell's* limitation of liability under § 1983 to actual wrongdoers that

decision against the CAEP and UCA (PA. 186-96). *Respondeat superior* makes a master liable for the torts of his servant acting within the course of his employment. A servant performs services in the affairs of the master subject to at least the master's right of physical control. For the CAEP or UCA to be liable by virtue of *respondeat superior*, the Union must have been their servant in the operation of the referral system. The Union was not the servant of either the CAEP or UCA: (1) the Union did not perform any service for the CAEP or UCA since they never hired an operating engineer and never used the referral system; and (ii) the CAEP or UCA did not control the Union in its operation of its referral system and did not have the right to so control the Union.

4. The district court held that, by analogy to Restatement (2d) Agency, § 214, 42 U. S. C. § 1981 creates a "non-delegable" duty of a sort not precisely defined (PA. 192-194). Seemingly, that court perceived § 1981 as requiring the CAEP and UCA to insure that the Union not discriminate in the operation of the non-discriminatorily-constructed referral system earlier acceded to by the CAEP, even if they did not know the Union was dis-

11. (Cont'd.)

§ 1981 as well may not support vicarious liability. A reading of the two provisions *in pari materia* on the issue of vicarious liability is compelled both by this Court's opinion in *Monell* and by the basic purpose of § 1981, which is, as set forth herein, to prohibit only purposeful discrimination. In this regard, a major factor in the decision of *Monell* was Congress' rejection after heated debate of the proposed Sherman Amendment. That amendment would have made municipalities vicariously liable for the unlawful acts of its citizens. Obviously, the Reconstruction Congress was opposed in 1871 to vicarious liability in connection with § 1983. It is fair to infer that the Reconstruction Congress had no different view where, only a year before in 1870, it reenacted the related statute, § 1981.

criminating (PA. 414). Apart from the unsupportive language of § 1981, an examination of the so-called non-delegable duty principle, particularly as it is articulated in § 214, reveals that it is applicable where an independent contractor, as contra-distinguished from a servant, performs a service for a principal. As set forth in (3) above, the Union never performed any service for either the CAEP or UCA; therefore, the non-delegable duty principle has no application to the facts of this case.

5. The district court made the now unchallenged finding that there was a failure to prove that the CAEP or the UCA intended to discriminate. But, the courts below ruled that § 1981 does not require for its violation a finding of an intent to discriminate. Because of the nexus between the Fourteenth Amendment and § 1981, *inter alia*, this court should rule, especially in view of its decision in *Washington v. Davis*, 426 U. S. 229 (1976), that § 1981 does require for its violation a finding of an intent to discriminate. Because of the unchallenged finding of no intent to discriminate by the CAEP and UCA, they cannot be liable in this case under § 1981.

6. The courts below did not find that either the CAEP or the UCA engaged in any discriminatory conduct violative of § 1981. Instead, they concluded only that these associations, which are not even employers of operating engineers are vicariously liable for the discrimination committed by the Union. Nonetheless, under its injunction, the district court imposed substantial monetary obligations upon the CAEP and UCA. Since this Court has instructed that any federal-court injunction should not exceed in scope the wrong sought to be remedied, the CAEP and UCA should be relieved of any obligation under any decree in this case. *Dayton Board of Education v. Brinkman*, 433 U. S. 406, 420 (1977).

## ARGUMENT

The decision by the district court, as affirmed by the equally-divided court of appeals, in respect of the CAEP and UCA is puzzling. They were *only* collective bargaining representatives *and not employers of operating engineers,* and, hence, could not have been found to have either used the hiring hall or contractually relied on the Union's referral system for employees. Notwithstanding, the district court stated that its theory of vicarious liability under *respondeat superior* applied to the defendant associations because they "participated in the creation or approval of an exclusive hiring hall provision" (PA. 128). However, as the district court readily recognized, the exclusive racially-neutral hiring-hall referral provision was on its face lawful (PA. 30). Moreover, although the district court made the now unchallenged findings that the associations, including CAEP and UCA, were not aware that the Union was operating the system in direct violation of the rules and in a discriminatory fashion, it nonetheless found that the associations could still be held vicariously liable under § 1981 (PA. 168-69).

In arriving at such a conclusion, the district court seemingly held that under § 1981 the associations not only have the duty not to engage in discriminatory conduct, but also a separate and additional duty to insure that the Union did not discriminate "outside" the agreement (PA. 186). In summary, what the district court did was to hold that under § 1981, a trade association which does not employ any person represented by the Union is to be viewed as a strictly-liable insurer for any and all discriminatory conduct perpetrated by Union hiring-hall personnel simply because that association "participated in the creation or approval of an exclusive hiring hall provision" which was neutral on its face (PA. 128). And, in arriving at its conclusion that the associations are vicariously liable

under § 1981 irrespective of whether the associations had any knowledge of said conduct, the district court did acknowledge that "no case has been found which imposes civil rights liability on the employer or *association* in these precise circumstances. . . ." (emphasis added) (PA. 169).

Upon examination of the lengthy liability opinion of the district court, very little of which is directed to any explanation for the liability found against the associations, it seems apparent that the court relied upon four separate bases for its at best dubious conclusion that vicarious liability could be imposed under § 1981 against the associations. They are as follows:

(1) that which the district court referred to as "analagous National Labor Relations Act cases";

(2) that which the district court referred to as "Title VII cases in which an employer's agreement to a facially neutral hiring hall system [sic] [12] had a discriminatory impact";

(3) that which the district court referred to as "cases and principles relating to the applicability of *respondeat superior* liability under § 1981 [13]; and

(4) perhaps what should be a subheading under (3), the presence in § 1981 of some undefined nondelegable duty which the district court perceived by "[a]nalogy to Section 214 of the Restatement (second) of Agency".[14]

---

12. The cases cited by the district court involved facially-neutral *seniority* systems, not *hiring-hall* systems.

13. PA. 169.

14. PA. 192-93. In what purports to be a summary of the bases for the vicarious liability conclusion by the district court (PA. 169), there appears in (2) a reference to certain Title VII and § 1981 decisions. Although it may appear that these cases are used by the district court to ground liability, in fact that court, rather than relying on these cases, attempted to distinguish them.

However, when these bases are subjected to scrutiny, it quickly becomes obvious that, when taken individually or collectively, they do not lend any support whatever to the conclusion that collective bargaining representatives like the CAEP and UCA can be liable under the circumstances of this case for the discrimination committed by the Union.

## I. The NLRA Cases Cited by the District Court Do Not Support the Imposition of Liability Upon the CAEP or UCA and Instead Require That They Be Held Not Liable.

The district court cited some cases decided under the National Labor Relations Act ("NLRA") as support for its conclusion that the associations are vicariously liable for the Union's discrimination (PA. 169-73). The NLRA cases were cited by the district court because of *its view* that they held an employer liable—none of the cases involved the liability of an association—for union-membership discrimination by a union in the operation of a referral system where the employer did not have knowledge or reason to know of the discrimination. A careful reading, however, of these cases reveals that the district court interpreted them incorrectly. Instead of the interpretation placed upon them by the district court, these cases hold that no liability can attach to an employer who neither knew nor had reason to know of discrimination being practiced by a union in its operation of a facially-neutral referral system. Thus, since the associations—who additionally never employed operating engineers—neither knew nor had reason to know of the Union's discrimination, this line of cases requires that they be *held not liable.*

In this context, the district court relied virtually entirely upon one decision: *Morrison-Knudsen Co., Inc. v.*

*NLRB*, 275 F. 2d 914 (2d Cir. 1960), *cert. denied*, 366 U. S. 909 (1961).[15] In that case, a union which operated an exclusive hiring-hall discriminated against non-union individuals in referrals to an employer and forced non-union individuals to pay it a license fee known as "dobie". The court of appeals noted that the union acted as the employer's agent[16] in selecting the workers to be hired and that the union's discriminatory acts were properly chargeable to the employer as principal. The court stated, however, that it was clear that the employer knew of the illegal collection of the dobie and knew to some extent of the union's discriminatory referrals. 275 F. 2d at 917. The court of appeals therefore affirmed the findings of the NLRB that the employer had violated Section 8(a)(3) of the Act.

Despite these facts, the district court extrapolated from *Morrison-Knudsen* the sweeping proposition that under the NLRA, both the employer and its collective bargaining representative are legally responsible, on some type of absolute liability basis, for the discriminatory acts which a union, *in breach of a collective bargaining agreement*, commits in the operation of an exclusive hiring hall from which that employer obtains applicants for employment *without regard* as to whether the employer or

15. The district court also makes reference to the decision in *NLRB v. United States Steel Corp.*, 278 F. 2d 896 (3d Cir. 1960) in support of its notion that, under the NLRA, the action of a union agent may be chargeable to the employer principal on some type of vicarious liability theory. In *U. S. Steel*, however, the "union" agent, for whose discriminatory hiring decisions liability was imputed to the employer, was in fact a *supervisory employee* of the company and had been given the authority to act as a hiring agent.

16. Since the principal-agent relationship must be fiduciary in nature, as a matter of law a union never should be the agent of an employer. *See* Restatement (2d) of Agency, § 1; 29 U. S. C. §§ 158(a)(1) and (2).

its association representative knew or had reason to know of the discrimination. However, two other courts of appeals which have confronted the issue of the *Morrison-Knudsen* holding interpret that holding in a way diametrically opposed to the interpretation given by the district court here. These courts have noted that *Morrison-Knudsen* involved a situation in which it was clear that the employer had some knowledge of the union's discrimination. *See NLRB v. Master Stevedores Association of Texas,* 418 F. 2d 140 (5th Cir. 1969); *Lummus Co. v. NLRB,* 339 F. 2d 728 (D. C. Cir. 1964). Furthermore, these courts expressly require that in order for liability to attach to such an employer, the employer must know or have reason to know of the union's discrimination. *Master Stevedores, supra,* 418 F. 2d at 142; *Lummus, supra,* 339 F. 2d at 737. *See also NLRB v. Southern Stevedoring and Contracting Co.,* 332 F. 2d 1017 (5th Cir. 1964). In fact, the principles which these NLRA cases enunciate are, if anything, *stricter* than traditional common-law concepts in the cautionary approach which they take toward finding any liability relationship between an employer and the union which refers workers to it. *See Lummus, supra,* 339 F. 2d at 735-37. Also, as stated earlier, none of these cases involves an association.

Thus, despite the reliance of the district court upon *Morrison-Knudsen,* neither that decision nor other judicial authority under the NLRA supports the conclusion that a non-wrongdoing association may be held liable for the discriminatory acts of a union in the absence of knowledge or at least reason to know of the union's discrimination. Since the district court found that the associations neither knew nor had reason to know of the Union's discrimination, the NLRA authorities cited by the district court dictate that the CAEP and UCA are *not* liable (PA. 168).

## II. The Title VII Seniority-System Cases Relied Upon by the District Court Are Inapposite.

The second of the bases used by the district court to impose vicarious liability on the associations, including the CAEP and UCA, involves facially-neutral seniority-system provisions in collective bargaining agreements, the application of which resulted in an actionable discriminatory impact upon minorities under Title VII of the Civil Rights Act of 1964.

In these cases, decided prior to the decision of this Court in *International Brotherhood of Teamsters v. U. S.*, 431 U. S. 324 (1977),[17] employer liability arose *directly from compliance* with the terms of a facially-neutral seniority provision, the performance of which resulted in a discriminatory impact upon minorities (PA. 181-86). These cases, too, do not involve association liability. And, in any event they have absolutely no legal relevance in the present context for in these Title VII seniority cases, as the district court recognized, the discriminatory impact resulted from performance of the collective bargaining agreement in the manner *intended* by the union and the employer. Liability in these Title VII cases, therefore, was assessed jointly against the employer and the union.

In the instant case, however, the district court found that the discrimination resulted not from the Union's com-

17. The cases referred to are: *Myers v. Gilman Paper Corp.*, 544 F. 2d 837 (5th Cir.), *cert. dismissed*, 434 U. S. 801 (1977); *Carey v. Greyhound Bus Co.*, 500 F. 2d 1372 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F. 2d 1364 (5th Cir. 1974); *Robinson v. Lorillard Corp.*, 444 F. 2d 791 (4th Cir.), *cert. dismissed*, 404 U. S. 1006 (1971). These decisions reflect the state of the law prior to *Teamsters*, in which case this Court ruled that a bona fide seniority system which has a discriminatory impact upon minorities is exempt from liability by virtue of Section 703(h) of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2(h).

pliance with the hiring-hall provision but because the Union acted *in violation* of the agreement (PA. 120). The district court recognized that if the Union had complied with the agreement, the hiring-hall provisions thereof would not have created any actionable discriminatory impact (PA. 30, 120). Despite this recognition, the district court nonetheless determined that only "a short conceptual step" is required to impose liability *vicariously* upon an association which had no reason to make use of the Union's referral system and had no knowledge or reason to know of the Union's acts of discrimination (PA. 186). In this regard, the district court's opinion is silent as to the length of the "step" necessary to impose liability upon the associations. Indeed, nothing in these Title VII cases supports the long conceptual leap which the district court strained to make in creating its theory of vicarious liability.

**III. Under Settled Legal Principles of *Respondeat Superior*, the Relationship Between the Associations and the Union Is Insufficient to Support the Imposition of Vicarious Liability.**

The third of the bases used by the district court to impose vicarious liability on the associations is the doctrine of *respondeat superior*. This doctrine makes a master liable for the torts of his servant acting within the course of his employment. Under well-settled master-servant principles, an association could only be liable to the plaintiffs in this action if it is determined that the Union was acting as the association's servant in carrying out the actual operation of the referral system and that it was acting within the course of its employment. If it is determined that the Union was not the servant of the associations, the associations cannot be held vicariously liable under the doctrine of *respondeat superior* for any torts of the Union. *See*, Restatement (2d) of Agency, § 219.

A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control. *Id.* at § 2(1). Therefore, if the Union did not perform any services for the CAEP or UCA or if control of or the right to control the Union's hiring-hall personnel by these associations was absent, the Union was not the servant of the CAEP or UCA, but instead, at most was an independent contractor. If the Union is an independent contractor, the general rule of *respondeat superior* is that the associations could not be liable for any tortious conduct, including violations of § 1981, committed by the Union.

It is clear in this case that the Union did not perform any services for either the CAEP or UCA. Those associations, which did not ever employ an operating engineer, had no reason to and did not use the Union's referral system. As stated previously, the CAEP and UCA were simply bargaining representatives for contractors who employed, among others, operating engineers. For this reason alone, the Union could not have been a servant of the associations, and therefore they could not have been liable for any tort of the Union.

Moreover, the district court accepted, by implication, that the associations—and for that matter any contractor—did not physically control the operation of the Union's referral system. However, that court must have concluded that the associations did have some *right to control* the physical operation of the Union's referral system, although it never defined what gave rise to that asserted right to control. And, if that court did not so conclude, then its reliance upon *respondeat superior* was for that reason wholly misplaced.

Notwithstanding the district court's assertions, plainly the associations did not have any right to control the opera-

tion of the Union's referral system. At no place in the Union's collective bargaining agreement or elsewhere is there any expression or implication that either the CAEP or UCA had any right to control the operation of that system. The district court referred in this context to the non-discrimination clause in that agreement. That provision, however, defines only the *result* to be produced, not the *means* therefor. Also, there is a reference in the opinion of the district court to a grievance procedure to adjudicate complaints of individual operating engineers respecting the operation of the referral system. Clearly, this does not impart to either the CAEP or the UCA a right to control the operation of the Union's referral system, simply because this procedure may be triggered only by the complaint of an individual represented by the Union.

Therefore, since neither the CAEP nor the UCA had either control of or the right to control the physical operation of the Union's referral system, for that reason also the Union could never be a servant of those associations.

Quite apart from a detailed analysis against the backdrop of *respondeat superior* principles, the nature of the relationship between a union on the one hand and an employer and its bargaining representative on the other clearly reveals that the union never could be the servant of the representative or the employer. As a matter of law, a union must be free from domination or control by any employer or his representative in carrying out the union's function as a representative for employees. 29 U. S. C. §§ 158(a)(1) and (2). But, the essence of the legal relationship of master and servant is the actual or right to dominate or control the physical conduct of the servant. By a simple comparison of the nature of the union-employer relationship and that of master-servant, it becomes apparent that they are intrinsically incompatible and cannot co-exist.

## IV. The Concept of a Non-Delegable Duty Under § 1981 Is Not Applicable to the Associations.

The final of the four bases used by the district court in its attempt to support its liability theory against the associations is that by analogy to Restatement (2d) Agency § 214, § 1981 should be interpreted as creating a so-called non-delegable duty which, in turn, makes the associations liable under the facts of this case. Although it refers to such a duty, the district court does not give any hint as to the precise nature of that duty.

To gain some understanding of the district court's ruling in this regard, it is helpful to focus on why it took this novel position. As previously set forth, there simply is no basis in the record of this case for a determination that the Union was the servant of any association, thereby justifying the conclusion that such association, as master, is vicariously liable for the torts of the Union.

The general rule is that a principal is not liable for the torts of an independent contractor. However, as recognized in § 214, as to a few somewhat unique fact patterns, a principal may be held liable for a failure by an independent contractor to discharge a duty owed by the principal to a third party. The duty found in these fact patterns is referred to as a non-delegable duty on the part of the principal.

Lacking any basis whatever to impose vicarious liability under the general rule, the district court reached out for the non-delegable duty exception, and then without precedent, analysis, or hesitation it read a non-delegable duty into § 1981.

As reflected in the district court's opinion (PA. 194-95), the factual underpinning for that court's holding that the employers and associations are liable for the Union's

discriminatory conduct in operating the hiring hall was the finding that the *employers* delegated a function of their hiring process to the Union. However, this finding is totally immaterial to and unsupportive of a conclusion of liability as against the associations. Clearly, as non-employers of operating engineers, the associations *never delegated* any part of their hiring process to the Union. Therefore, in the actual operation of the referral system, the Union personnel never performed any functions that the associations themselves would have had to perform irrespective of whether the collective bargaining agreement contained a hiring-hall provision.

In light of the foregoing, there can be no basis for the conclusion that there exists as between the *associations* and the *Union* even a principal-independent contractor relationship. Moreover, since it is clear that no principal-independent contractor relationship exists between the associations and the Union, it is equally clear that the concept of non-delegable duty cannot be utilized as a basis for imposing liability against the CAEP and UCA.

## V. Since the Associations Did Not Engage in Any Intentional Racially-Discriminatory Conduct, They Cannot Be Held Liable Under § 1981.

The district court held that CAEP and UCA did not themselves engage in any racially-discriminatory conduct. In point of fact, in their role as representatives for some of the 1400 employers in the defendant class, their only operative conduct that was relied upon by the district court was to accede to a lawful exclusive hiring-hall provision which is racially-neutral on its face. Moreover, the district court concluded that there was no showing that the associations either knew or had reason to know that the Union had engaged in discriminatory conduct, and found an absence

of proof of an intent to discriminate. Nonetheless, the district court still found that the associations were liable under § 1981. By so holding, the courts below have made the associations absolutely liable for any and all discriminatory acts against minority operating engineers, which constituted the Union's breach of the hiring-hall provisions, and did so in the absence of a finding of an intent to discriminate.

This Court should not permit such a ruling to stand for it is totally contrary to the overwhelming weight and better-reasoned authority which holds that, before a party can be held liable under § 1981, the plaintiff must prove an intent to discriminate. In accord with this Court in *Washington v. Davis*, 426 U. S. 229 (1976), nine of the courts of appeals have now either held or implied that proof of intentional discrimination is necessary under § 1981.[18] Therefore, in the absence of any finding that the CAEP or

18. *Croker v. Boeing Co.*, — F. 2d —, 26 FEP Cases 1569 (3d Cir. 1981); *Des Vernes v. Seekonk Water Dist.*, 601 F. 2d 9 (1st Cir. 1979); *Guardians Ass'n v. Civil Service Comm'n*, 633 F. 2d 232 (2d Cir. 1980), *petition for cert. filed*, 50 U. S. L. W. 3157 (U. S. Aug. 31, 1981) (Nos. 81-431, 432); *Williams v. DeKalb County*, 582 F 2d 2 (5th Cir. 1978); *Grigsby v. North Mississippi Medical Center, Inc.*, 586 F. 2d 457 (5th Cir. 1978); *Detroit Police Officers' Ass'n v. Young*, 608 F. 2d 671 (6th Cir. 1979), *cert. denied*, 101 S. Ct. 3079 (1981); *City of Milwaukee v. Saxbe*, 546 F. 2d 693 (7th Cir. 1976); *Mescall v. Burrus*, 603 F. 2d 1266 (7th Cir. 1979); *Johnson v. Alexander*, 572 F. 2d 1219 (8th Cir.), *cert. denied*, 439 U. S. 986 (1978); *Donnell v. General Motors Corp.*, 576 F. 2d 1292 (8th Cir. 1978); *Craig v. County of Los Angeles*, 626 F. 2d 659 (9th Cir. 1980), *cert. denied*, 101 S. Ct. 1364 (1981); and *Chicano Police Officer's Ass'n v. Stover*, 552 F. 2d 918 (10th Cir. 1977). *But see Kinsey v. First Regional Securities, Inc.*, 557 F. 2d 830, n. 22 (D. C. Cir. 1977).

Obviously, the ruling of the Third Circuit in *Croker, supra*, is contradictory to the earlier ruling in the instant case by that same court.

UCA had an intent to discriminate, they cannot be liable under § 1981 [19] (PA. 195).

### A. The Relationship Between § 1981 and the Equal Protection Clause of the Fourteenth Amendment Requires the Conclusion That for § 1981 to Be Violated There Must Be a Finding of Discriminatory Intent.

§ 1981 was derived from both § 1 of the Civil Rights Act of 1866 and § 16 of the Voting Rights Act of 1870. *Runyon v. McCrary*, 427 U. S. 160, 169 n. 8 (1976). Indeed, this Court has stated that "the operative language of both § 1981 and § 1982 is traceable to the Act of April 9, 1866." *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U. S. 431, 439 (1973); *Runyon v. McCrary*, 427 U. S. at 171.

Following the enactment of the Civil Rights Act of 1866, some members of the Congress became concerned that the Act's application to the states may have been violative of the Constitution and that a subsequent Congress might repeal the Act. A joint resolution which addressed these concerns later became the Fourtenth Amendment. *United States v. Wong Kim Ark*, 169 U. S. 649, 675 (1898). This Court has recognized that a major impetus behind enactment of the Fourteenth Amendment was the Congressional goal of treating these issues by incorporating the provisions of the 1866 Act into the Constitution. *Hurd v. Hodge*, 334 U. S. 24, 32-33 (1948). This Court has also recognized the close relationship between the 1866 Act and the Fourteenth Amendment in stating that the two enactments were "expressions of the same general congressional policy." *Id.* at 32.

---

19. Even if this Court were to engraph the Title VII "impact only" standard under § 1981, reversal is still required because plaintiffs failed to prove that the petitioner associations engaged in any conduct whatever which caused a racially disparate impact.

Subsequent to the passage of the Fourteenth Amendment, the Civil Rights Act of 1866 was retained in its entirety as a part of the Voting Rights Act of 1870.[20] *Tillman v. Wheaton-Haven Recreation Ass'n., Inc.*, 410 U. S. at 439 n. 11. Section 1 of the 1866 Act was reenacted, with minor revisions which did not alter its scope,[21] in § 16 of the 1870 Act. In 1874, § 16 of the 1870 Act was codified as § 1977 of the Revised Statutes, which today is codified as 42 U. S. C. § 1981. The language of Revised Statutes § 1977 was identical to that which constitutes § 1981, and this Court has stated that § 1977 put "in the form of a statute what had ben substantially ordained by the [Fourteenth] amendment. It was a step toward enforcing the constitutional provisions." *Strauder v. West Virginia*, 100 U. S. 303, 312 (1879); *see Buchanan v. Warley*, 245 U. S. 60, 79 (1917) (§ 1977 a statute "enacted in furtherance of the [Fourteenth Amendment's] purpose.").

In addition to the common historical background and the congressional policy underlying the two provisions, a reading of the provisions *in pari materia* indicates that both are fundamentally *equal protection enactments*. Senator Trumbull, the author of the bill which was to become Section 1 of the Civil Rights Act of 1866 and eventually § 1981, in explaining its purpose stated that "any statute which is not *equal to all*, and which deprives any citizen of civil rights, which are secured to other citizens is an unjust encroachment upon his liberty . . ." Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (emphasis added).

---

20. Section 18 of the Voting Rights Act of 1870 provided in pertinent part: "That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted. . . ."

21. *See, Jones v. Alfred H. Mayer Co.*, 392 U. S. 409, 436 (1968).

In view of the above, it is apparent that the relationship of § 1981 and the Fourteenth Amendment is one which, for practical purposes, is so close that the two enactments are difficult if not impossible to separate on any basis. The two provisions have a common origin and directly relate to identical congressional goals.

In *Washington v. Davis*, 426 U. S. 229 (1976), this Court held that proof of a racially discriminatory intent or purpose is required in order to establish a Fourteenth Amendment equal protection violation. As a direct result of the demonstrated inseparable relationship between § 1981 and the Fourteenth Amendment, the intent standard which this Court required in *Washington v. Davis* must be applied to alleged violations of § 1981. Such a determination would be consistent with sound rules of statutory construction, which require statutes involving constitutional rights to be read in light of the Constitution, and indeed that "[t]he Constitution and the statute will be construed together as one law." *Cincinnati, No. 2 T. P. R. Co. v. Kentucky*, 115 U. S. 321, 334 (1885).

**B. The Language and Legislative History of § 1981, as Well as Prior Decisions of This Court, Require a Determination That § 1981 Is Directed Only Toward Acts of Purposeful Discrimination.**

There exists absolutely no indication in the language or legislative history of § 1981 which would support the extension of liability for violations thereof to other than acts of intentional or purposeful discrimination. On the contrary, in *Croker v. Boeing Co.*, — F.2d — , 26 FEP Cases 1569 (3d Cir. 1981), the court stated "if [the language] points in any direction, it suggests a requirement for proof of purposeful discrimination." *Id.* at 1575, *citing City of Memphis v. Greene*, — U. S. —, 101 S. Ct. 1584, 1602 (1981) (White, J., concurring); *Guardians*

*Ass'n v. Civil Service Comm'n*, 633 F. 2d 232, 267 (2d Cir. 1980). Similarly, the legislative history unequivocally demonstrates that the 39th Congress was concerned with acts of purposeful racial discrimination which would deny black citizens their basic civil rights under the laws of the land.

Justice White, concurring in the decision of the Court in *City of Memphis v. Greene, supra*, a 42 U. S. C. § 1982 case, has stated that "nothing in the legislative history of [the 1866] Act suggests that Congress was concerned with facially neutral measures which happened to have an incidental impact on former slaves." [22] Since this Court has clearly held that Sections 1981 and 1982 are so interrelated that they should be construed similarly when applied to private forms of discrimination, *Tillman v. Wheaton-Haven Recreation Ass'n, Inc.*, 410 U. S. at 440, the rationale of Justice White's opinion is fully applicable to the instant § 1981 action. The legislative history of Title VII stands in stark contrast to that of § 1981 in that the

22. 101 S. Ct. at 1603. Justice White also stated that "[t]he supporters of the bill emphasized time and again that the measure was designed to eradicate *blatant deprivations* of civil rights. See, e.g., Cong. Globe, 39th Cong., 1st Sess. 322, 339-40, 474-75, 516-17, 1123, 1151-52, 1159-60, 1833-35 (1866)." *City of Memphis v. Greene*, 101 S. Ct. at 1603 (emphasis added). *See, Croker v. Boeing Co.*, — F. 2d —, 26 FEP Cases at 1577 ("We think that it is more likely than not that the statute was addressed to such intentional conduct . . . The employees have not directed our attention to any legislative history that reveals a contrary intent. We doubt that they could"); *Guardians Ass'n v. Civil Service Com'n.*, 633 F. 2d at 267 ("It is sufficient to say that plaintiffs have been unable to cite and we have been unable to find *anything* in the legislative history to indicate that either the Thirty-Ninth Congress, which enacted the 1866 Act over a presidential veto, or the later congresses that subsequently re-enacted the provisions understood the law to prohibit anything other than the racially motivated refusal to treat whites and non-whites in the same, neutral manner").

former indicates congressional concern over the impact of neutral employment practices on employment opportunities. *See Griggs v. Duke Power Co.*, 401 U. S. 424, 434-36 (1971).

Likewise, prior decisions of this Court suggest a similar result. In *Jones v. Alfred H. Mayer Co.*, 392 U. S. at 426, which involved Section 1 of the Civil Rights Act of 1866, and specifically 42 U. S. C. § 1982, this Court held that § 1 of the 1866 Act, which was a source for § 1981, was intended to prohibit all "racially motivated" deprivations enumerated in the statute. *Id.* And, in *Runyon v. McCrary*, 427 U. S. at 170-71, this Court held that § 1981 would be violated if a Negro offeree is not extended the same opportunity to enter into contracts as is extended to white offerees, *solely because he was a Negro. Id.* Thus, the holdings of this Court also support the view that § 1981 requires proof of purposeful or intentional discrimination.

### C. Application of Other Than the Intentional Discrimination Standard to § 1981 Would Substantially Undermine Both *Washington v. Davis* and the Title VII Enforcement Scheme.

In *Washington v. Davis*, this Court indicated that the application of other than an intentional discrimination standard to the Fourteenth Amendment would raise serious questions about many existing statutes. 426 U. S. at 248. As demonstrated above, the scope of § 1981's prohibitions is virtually coextensive with that of the Fourteenth Amendment's equal protection clause. Both enactments extend well beyond the area of employment discrimination, and thus if § 1981's standard of liability is held to be less than that of the Fourteenth Amendment, the holding of *Washington v. Davis* may easily be circumvented by plaintiffs alleging a § 1981 cause of action in lieu of a Fourteenth Amendment based claim. "In fact, because

§ 1981, unlike the fourteenth amendment, covers not only governmental but also private conduct, an impact standard applied to § 1981 could be more intrusive than would one applied to the fourteenth amendment." *Croker v. Boeing Co.*, 26 FEP Cases at 1577 (citations omitted).

Moreover, Title VII is the regulatory scheme chosen by Congress in the employment discrimination area. Section 1981's application to this area is dissimilar to that of Title VII in several important respects: 1) Title VII requires administrative prerequisites to suit while § 1981 has none;[23] 2) Title VII requires that attempts at conciliation be exhausted prior to initiation of suit while § 1981 does not;[24] 3) Title VII contains a two-year statute of limitations on back pay while § 1981 has no such limitation;[25] 4) § 1981 provides remedies which are distinct from those provided by Title VII.[26] All of the above-referenced differences between Title VII and § 1981 would tend to encourage plaintiffs to bypass and/or circumvent Title VII, the congressionally-chosen scheme, should this Court determine that a § 1981 violation can be sustained without proof of intent to discriminate. The number of employment discrimination cases reaching the federal court system would certainly increase, contrary to the intent of Congress in enacting Title VII.

---

23. *Compare*, 42 U. S. C. § 2000e-5(e) and (f)(1) *with Johnson v. Railway Express Agency, Inc.*, 421 U. S. 454, 460-62 (1975).

24. *Compare, e.g., Occidental Life Insurance Co. v. EEOC*, 432 U. S. 355, 359-60 (1977), and *Alexander v. Gardner-Denver*, 425 U. S. 36, 44 (1974), *with Johnson v. Railway Express Agency, Inc.*, 421 U. S. at 460-62.

25. *Compare*, 42 U. S. C. § 2000e-5(g) *with Johnson v. Railway Express Agency, Inc.*, 421 U. S. at 460.

26. *See, Johnson v. Railway Express Agency, Inc.*, 421 U. S. at 461.

## VI. In Ordering a Sweeping Remedy Imposing Obligations Far Beyond Those Necessary to Correct the Precise Violation Found, the Courts Below Exceeded the Scope of Remedial Authority.

The violations of law found by the district court were the *Union's* discriminatory entry practices and its discriminatory implementation of a referral system which on its face was neutral and which, if operated properly, would not have resulted in discrimination. The district court did not find that any associations, including the CAEP and UCA, were liable because their own employment practices in any way violated § 1981. Rather, the district court found that they were vicariously liable notwithstanding the unchallenged findings (i) that they negotiated a lawful and racially neutral hiring-hall referral system, (ii) that they, as non-employers of operating engineers, had no subsequent contact with the actual operation of the Union's hiring hall, and (iii) that they had no knowledge that the Union was violating the hiring-hall's referral rules and in so doing was engaging in racially-discriminatory conduct (PA. 30, 168).

In view of its findings that the Union discriminated in entry and in its referrals, the district court quite properly imposed various affirmative obligations upon the *Union* designed to ensure, *inter alia*, that the referral system would work properly. But the district court also mandated an extensive remedial scheme directed to the defendant class of employers—a financially expensive scheme which includes *inter alia*: (1) mandatory manpower utilization quotas and monthly and quarterly reports of compliance therewith; (2) participation in a mandatory skill upgrading program; and (3) the creation of a master's position, reporting and advisory committee, and the financing thereof.[27] Such sweeping injunctive relief against

27. In paragraph 27 through 30 of its decree, as modified by its various post-decree orders, the district court has imposed upon

all fourteen-hundred contractors in the defendant contractor class itself is inconsistent with the decisions of this Court. Moreover, although finding no wrongdoing by the CAEP or UCA, the district court nevertheless ordered that each of these associations pay ten percent (10%) of the total expenses of the court's mandated remedial training and hiring program (PA. 285). So far, the expenses incurred in the first year under the five-year decree

---

27. (Cont'd.)

each of the more than fourteen-hundred "defendant" employers specific minority manpower utilization quotas that each must meet or risk further court-imposed sanctions. In this regard, at paragraph 29, the court not only ordered that a court-appointed master, to whom broad authority was delegated under paragraphs 9 to 11, would *audit* each of the more than fourteen-hundred employers' performance on a quarterly basis, but also placed the burden of proving a valid reason for not reaching the court-imposed minority employment quotas on the individual employer (PA. 243).

In conjunction with its imposition of these minority employment quotas, the district court at paragraph 43 as amended mandated the structuring of an elaborate record-keeping and reporting system wherein each of the fourteen-hundred employer members of the defendant class is required to file with the master, a reporting committee, and the plaintiffs both monthly and quarterly reports regarding the racial breakdown of hours worked and wages earned by operating engineers. So, too, in paragraph 44 as amended, the district court set up a detailed enforcement system based upon these reports wherein on both a quarterly and annual basis the court-appointed master is permitted to hold compliance hearings and take corrective action on allegations of non-compliance against any one or all of the fourteen-hundred employers required to make said reports (PA. 248-49).

In addition, the court in paragraphs 24, 41, and 42 imposed upon the defendant employers the responsibility for retraining and upgrading programs to be developed under the auspices of a master and advisory committee (PA. 240, 247).

have totalled approximately $200,000. Already the CAEP and UCA have been ordered to pay approximately $40,000 under the decree. The end result of such an order is that the district court is requiring the CAEP and UCA to pay money damages for the wrongs actually committed by the Union.

Clearly, there is no basis under the well-established principles of equity law for the imposition of such monetary remedy against the CAEP and UCA. This Court has admonished on numerous occasions that in fashioning an equitable remedy for a violation of law, a federal court is required to tailor the scope of the remedy to fit the precise nature of the violation. *See Dayton Board of Education v. Brinkman*, 433 U. S. 406, 420 (1977); *Milliken v. Bradley*, 418 U. S. 717, 744 (1974); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 16 (1971); *see also Rizzo v. Goode*, 423 U. S. 362 (1976).[28] The principles articulated in the foregoing cases brought under § 1983 apply with equal force in the area of employment discrimination. *See EEOC v. International Union of Operating Engineers, Local 14*, 553 F. 2d 251, 256 (2d Cir. 1977) (district court "should interfere with the defendant's operations no more than is necessary to [remedy the wrong]."); *Sledge v. J. P. Stevens & Co.*, 585 F. 2d 625, 650 (4th Cir. 1978) (vacating district court's imposition of quotas on the ground that the violations "are rectified by other of the injunctive provisions").

28. Seemingly, the logical extension of this principle is that, since a person held vicariously liable is not a tortfeasor, as a matter of law that person cannot be subject to an injunction relating to the tort for which he is held vicariously liable. *See, EEOC v. Enterprise Association Steamfitters*, 542 F. 2d 579, 589 (2d Cir. 1976), *cert. denied*, 430 U. S. 911 (1977); J. Pomeroy, *Equity Jurisprudence* § 1338 (5th ed. 1941).

Quite specifically, the district court, in accord with the plaintiffs' allegations,[29] found that the Union discriminated against minorities: (1) in entry into the Union; (2) in entry into the hiring-hall system; and (3) in actual selection for referral to work from the hiring-hall lists (PA. 30, 162). Accordingly, if these three discriminatory practices did not exist, there would have been no basis upon which the district court could have relied to find that the Union denied minorities the opportunity to gain work as operating engineers. Therefore, for purposes of injunctive relief, if these three discriminatory practices are remedied by the court's injunction, the underlying basis of the Union's discrimination will have been cured. Clearly, this goal has been reached through the court's specific imposition of affirmative entry and referral quotas upon the Union in its decree.

In light of these controlling principles, the district court, in fashioning its remedy, went far beyond the nature and extent of the violation proved. Surely, the findings of the district court did not justify any imposition of any financial burden even upon any employer. In view of the findings and the content of the district court's decree, it was even more outrageous for that court to impose a financial burden under its decree on non-wrongdoing entities who, as non-employers of operating engineers, have no employment nexus whatsoever with the plaintiffs. Therefore, this Court should direct the removal from the decree of all parts thereof which pertain to the CAEP and UCA,

29. As the district court stated: plaintiffs' allegations of discrimination are not directed against the hiring hall system per se but against the *Union's alleged intentional refusal to follow their own hiring hall rules,* thus causing intentional discrimination against and a discriminatory adverse impact on minorities. Plaintiffs *also allege* discrimination particularly in *admission into the Union* and *admission into the job referral process* (emphasis added) (PA. 30).

including that portion which specifically imposes the twenty percent (20%) financial obligation upon them.

As stated earlier, as *non-wrongdoing*, non-employers of operating engineers, there are absolutely no grounds under equity law to impose upon these associations the payment of twenty percent (20%) of the total expenses imposed by the district court under its decree. As reflected in the district court's finding, the Union was the active wrongdoer herein and hence it, and not the CAEP or UCA, should bear the financial burden of the relief decreed as a result of its discriminatory racial conduct in its referral system. To shift part of this financial burden to the CAEP and UCA is totally inequitable.

In fact, it is recognized that even between parties who have been held liable, costs and expenses are properly imposed only on the party found to have been the active wrongdoer. *City Bank v. Rivera Davila*, 438 F. 2d 1367, 1371 (1st Cir. 1971); *Thomas v. Duralite Co.*, 386 F. Supp. 698, 730 n. 14 (D. N. J. 1974), *aff'd in part and reversed in part on other grounds*, 524 F. 2d 577 (3d Cir. 1975). Additionally, in this regard, it is noted that the district court's imposition of financial burden upon the CAEP and UCA is diametrically opposed to the ruling of at least one other court faced with a strikingly similar fact pattern, but which, unlike the district court, followed the well-established principle of tailoring a remedy to cure only the defect found. From the associations' perspective, this strikingly similar fact pattern exists in *Rios v. Enterprise Ass'n Steamfitters Local 638*, 400 F. Supp. 993 (S. D. N. Y. 1975), *aff'd sub nom., EEOC v. Enterprise Ass'n Steamfitters*, 542 F. 2d 579 (2d Cir. 1976), *cert. denied*, 430 U. S. 911 (1977) (union only defendant chargeable with attorneys' fees).

## CONCLUSION

In view of the foregoing, the judgment of the court of appeals as to the CAEP and UCA should be reversed and this Court should remand for entry of judgment in favor of the CAEP and UCA and for modification of the injunction so as to exclude them from its terms.

Respectfully submitted,

JOHN J. MCALEESE, JR.
THOMAS J. MCGOLDRICK
LOUIS A. MINELLA
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, PA 19004
*Attorneys for Petitioner*

CUNNIFF, BRAY & MCALEESE
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, PA 19004
*Of Counsel:*

Office - Supreme Court, U.S.
FILED
FEB 22 1982
ALEXANDER L. STEVAS
CLERK

No. 81-331

IN THE

# Supreme Court of the United States

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA
and
THE UNITED CONTRACTORS ASSOCIATION,
*Petitioners,*

*v.*

COMMONWEALTH OF PENNSYLVANIA
and RAYMOND WILLIAMS, et al.,
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

## REPLY TO BRIEFS OF INDIVIDUAL AND CLASS AND COMMONWEALTH RESPONDENTS

JOHN J. MCALEESE, JR.*
THOMAS J. MCGOLDRICK
LOUIS A. MINELLA
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, PA 19004
(215) 667-7080
*Attorneys for Petitioners*

CUNNIFF, BRAY & MCALEESE
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, Pennsylvania 19004
*Of Counsel*

*Counsel of Record for Petitioners

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| ARGUMENT | 2 |
| I. Introduction | 2 |
| II. Respondents' Discussion of the Evolution of the Affirmative Action Program Is Irrelevant and Misleading | 3 |
| III. Petitioners CAEP and UCA Cannot Be Liable for the Union's Violation of § 1981 | 7 |
| A. Respondents' Non-Delegable Duty Argument Is Without Merit | 7 |
| 1. Section 1981 Does Not Give Rise to a Non-Delegable Duty | 8 |
| 2. The Cases Relied Upon by the Respondents Do Not Support a Finding of Liability Against the CAEP or UCA Under the Principle of Non-Delegable Duty | 11 |
| B. The Hiring-Hall Was Not a Joint Enterprise | 14 |
| C. There Exists No Relationship Supportive of Vicarious Liability | 16 |
| IV. The Injunctive Decree Against the Associations and Employers Is Not Authorized by the All Writs Act | 17 |
| CONCLUSION | 20 |

## TABLE OF AUTHORITIES


**Cases:** Page

Cort v. Ash, 422 U. S. 66 (1975) ..... 9
Emporium Capwell Co. v. Western Additional Community Organization, 420 U. S. 50 (1975) ..... 12
Logue v. United States, 412 U. S. 521 (1973) .....11, 16
NLRB v. Amax Coal Co., 101 S. Ct. 2789 (1981) ..... 3
NLRB v. Houston Chapter, Associated General Contractors of America, Inc., 349 F. 2d 444 (5th Cir. 1965) ..... 13
Northwest Airlines, Inc. v. Transport Workers Union, 451 U. S. 77 (1981) ..... 9, 10
People ex rel. Price v. Sheffield Farms-Slawson Decker Co., 225 N. Y. 25, 121 N. E. 474 (1918) ..... 11
Plum Creek Lumber Co. v. Hutton, 608 F. 2d 1283 (9th Cir. 1979) ..... 19
Stockwell v. United States, 80 U. S. 531 (1879) ..... 14
Teamsters Local 357 v. NLRB, 365 U. S. 667 (1961) ..... 13
Touche Ross & Co. v. Redington, 442 U. S. 560 (1979) ..... 9
United States v. Gilman, 347 U. S. 507 (1954) ..... 10
United States v. New York Telephone Co., 434 U. S. 159 (1977) ..... 18

**Constitution and Statutes:**

The Fourteenth Amendment ..... 13
All Writs Act, 28 U. S. C. § 1651 ..... 17-19
Civil Rights Act of 1964, Title VII, 42 U. S. C. § 2000e, *et seq.* 5, 12
Civil Rights Act of 1968, Title VIII, 42 U. S. C. § 3601, *et seq.* ..... 12
18 U. S. C. § 4042 .....11, 16
29 U. S. C. § 158(a)(2) ..... 15
42 U. S. C. § 1981 .....*passim*

**Other Authorities:**

Restatement (Second) of Torts § 491 ..... 14

No. 81-331

IN THE

# Supreme Court of the United States

THE CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA

and

THE UNITED CONTRACTORS ASSOCIATION,

*Petitioners,*

*v.*

COMMONWEALTH OF PENNSYLVANIA, and RAYMOND WILLIAMS, et al.,

*Respondents.*

## REPLY TO BRIEFS OF INDIVIDUAL AND CLASS AND COMMONWEALTH RESPONDENTS *

* All references to the Appendix to Petitions for Certiorari will be designated by "PA. ____"; all references to the Joint Appendix on Writ of Certiorari will be designated by "JA. ____". The brief for Individual and Class Respondents is cited as "Resp. Ind. Br.". References to trial transcript will be designated by "____ day, ____". References to Union trial exhibits will be designated by "U- ____".

## ARGUMENT

### I. Introduction.

Petitioners Contractors Association of Eastern Pennsylvania and the United Contractors Association note that Respondents' briefs to this Court are filled with inaccuracies and mischaracterizations of the record and of the opinion of the district court. So, also, the Petitioners have found that Respondents' legal arguments regarding the associations contain sweeping generalities wherein bald conclusions are arrived at without the benefit of any meaningful legal reasoning. Likewise, these Petitioners find that Respondents' citation to authority relied upon to support their propositions are often misleading.

Because of the Respondents' over-reaching, these Petitioners find it imperative to emphasize at the outset that the district court *did not find* that they had engaged in any intentional discrimination against minorities. Accordingly, the district court did not hold that they violated § 1981, nor that they denied to minorities the same right to make and enforce contracts as was enjoyed by whites. Rather, the district court held that each of these non-employer associations was liable vicariously, at least injunctively, for the Union's intentional discrimination in breach of § 1981 (PA. 168). The question of whether legal responsibility for the Union's discrimination can be lodged beyond the Union itself is what this Court must determine.

In addition, contrary to the Respondents' assertions, these Petitioners emphasize that the district court did not premise any association liability on any conduct of the Operating Engineers Joint Apprenticeship and Training Committee ("JATC"). It is imperative to note that the district court did not hold that anyone other than the JATC itself was liable for its discrimination. The district

court did not hold that the JATC trustees were the agents of any principal, and it is worthy of note that such a finding would have been improper under this Court's decision in *NLRB v. Amax Coal Co.*, 101 S. Ct. 2789 (1981), which decision makes clear that the trustee's duty is to the beneficiaries of the trust to the exclusion of the interests of all others. It was stated therein that "the duty of the management-appointed trustee of an employee benefit fund . . . is directly antithetical to that of an agent of the appointing party." *Id.* at 2795.

**II. Respondents' Discussion of the Evolution of the Affirmative Action Program Is Irrelevant and Misleading.**

In their briefs, both the Commonwealth and the Individual and Class Respondents discuss the Affirmative Action Program ("AAP") and its relation to the Union's federally-granted exemption from the Philadelphia Plan. The discussion of this matter in Respondents' briefs progresses as if this information is somehow relevant to the matter at bar. It clearly is not. However, for purposes of clarification, we will engage in a brief discussion of this matter.

Notwithstanding Respondents' assertions to the contrary, the district court did not find that any association or employer violated the law by any association's signing of the so-called AAP (PA. 198). Quite to the contrary, the district court grounded the Petitioners' vicarious liability under § 1981 for the acts of the Union solely "as a result of their contractual relationship to and use of a hiring hall system which in practice effectuated racial discrimination, whether or not the . . . *associations* knew or should have known" (PA. 168). Moreover, it is noted that the AAP was an alternative to the so-called Philadelphia Plan only insofar as the Plan's reporting requirements

related to work to be performed by the operating engineers' craft.[1]

The initial Philadelphia Plan came into existence on November 30, 1967, when the United States Department of Labor approved the Philadelphia Pre-Award Plan as a vehicle for providing affirmative action in employment among certain government contractors. As initially devised, the Plan itself was extremely limited in application for it applied only to federally-funded construction projects which were to exceed $500,000 and which were to be located in the immediate five-county Philadelphia area (JA. 173).[2]

The initial Philadelphia Plan required the apparent low bidder on the covered federally-funded job to include in its job contract an affirmative action program with specific manning tables containing a specific quota or schedule for minority employment for certain construction trades, including the operating engineers (JA. 173). The first construction project affected by this newly devised Philadelphia Plan was the construction of the Girard Point Bridge in Philadelphia County. A non-Pennsylvania contractor, Peter Kiewit and Sons Company of Omaha, Nebraska, was the low bidder on this thirty million dollar project (U-312). At the April, 1968, pre-job conference, the U. S. Department of Transportation, pursuant to the Philadelphia Plan requirement, requested a specific minority manning table for the job. At this time, Kiewit informed the federal government that it could not guarantee

1. Despite the signing of the Affirmative Action Program document, no contractor was relieved from following the Philadelphia Plan's specific minority manpower utilization requirements for the other Philadelphia-based craft construction trades covered by the Plan.

2. In contrast, Local 542's geographical jurisdiction covered all thirty-three counties of Eastern Pennsylvania and the entire State of Delaware.

specific quotas for operating engineers because it could not hire operating engineers directly (U-312, U-311, 132nd day 12067). In support of Kiewit's position, Pennsylvania's Secretary of Highways objected to the manning table demand because the Commonwealth believed that the manning table requirement was violative of the Civil Rights Act of 1964 (U-312).[3] Nonetheless, the federal government overruled the Commonwealth's objections and continued to withhold awarding this $30 million construction project to Kiewit.[4]

Shortly after the federal government's dispute with Kiewit and the Commonwealth surfaced, representatives of the U. S. Department of Labor summoned representatives of the Petitioner Associations to a meeting in Washington, D. C. (132nd day, 11945). As evidenced by the Kiewit situation, the U. S. Department of Labor realized that Local 542's hiring hall created a unique situation. Therefore, at this meeting the representatives of the U. S. Department of Labor presented the Associations' representatives with an already-drafted Affirmative Action Program document. As was explained to them by the federal government officials and the Local 542 representatives who also were in attendance at this meeting, the meeting was called to discuss an Affirmative Action Program, the content of which had been previously sanctioned by the U. S.

3. This original Philadelphia Pre-Award Plan was suspended and rescinded because of an Opinion by the U. S. Controller General that it violated the principles of competitive bidding (J.A. 173; 291-292).

4. At the time in question Kiewit was *not* a member of any Petitioner Associations. Moreover, it is equally important to note that the record evidence reveals that no contractor-member of the Petitioner Associations ever had any monies withheld from it as a result of the Philadelphia Plan's requirement for minority manning tables (132nd day, 11955-56).

Department of Labor for an operating engineers' local in Ohio which also had an exclusive referral system (132nd day, 11946-57, 12006-07; 12063-66).

This already-drafted document, in paragraph three thereof, stated that as a result of a detailed analysis, it was determined that there were 650 minorities affiliated with Local 542. In reviewing the document during their meeting, the Association representatives questioned Labor Department official Gentry and Local 542 President Dawson about the numerical count in paragraph three. In response, Mr. Gentry informed the Associations' representatives that he believed that the 650 number was a logical estimate (132nd day, 12063-64). Mr. Dawson likewise advised the Associations' representatives that he believed the figure was the correct estimate based upon the information that was available to Local 542 at that time (132nd day, 12064-65). In fact, in the previous year, the Union in its 1967 EEO-3 Report to the EEOC, estimated a total of 650 minorities out of 5000 members (P-169). Since the Petitioner Associations themselves had no way of knowing the number of minorities who were associated with Local 542, they accordingly relied upon the federal official and the Union for the minority number count.[5]

In this regard, it is most important to note that although the district court chastised the Associations for signing the Affirmative Action Program without first verifying the minority count, it found that the *Associations neither had actual knowledge of the formal error in figures or of the Union's discrimination generally* (PA. 198). In fact, the record evidence reveals that within a few months

5. Since the Petitioner Associations herein only bargained for approximately 100 of the 1488 contractors under agreement with Local 542, even an accurate survey of their own membership would have proved unhelpful.

after the signing of the Affirmative Action Program, Local 542 advised the U. S. Department of Labor that the approximation of 650 was incorrect.[6] However, despite this correction in the number, the U. S. Department of Labor specifically opted not to reinstate Local 542 within the coverage of the Philadelphia Plan when the Department amended its Philadelphia Plan on June 7, 1969, or at any time thereafter.

## III. Petitioners CAEP and UCA Cannot Be Liable for the Union's Violation of § 1981.

### A. Respondents' Non-Delegable Duty Argument Is Without Merit.

The factual underpinning for the Respondents' assertions that the employers and associations are liable for the Union's discriminatory conduct in operating the hiring hall was the finding that the *employers* delegated a function of their hiring process to the Union (PA. 169-70). However, this finding is totally immaterial to and unsupportive of a conclusion of liability as against the associa-

6. In Local 542's February 22, 1969, Affirmative Action Program written status report presented directly to Mr. Stalvey of the U. S. Department of Labor, the Union enclosed its February 17, 1969, letter to the EEOC. In that letter the Union advised the EEOC that the racial identification information on the enclosed EEO-3 form was based on a questionnaire survey mailed out to the Union's 6000 members to which 2845 responded. Of these, 193 identified themselves as minorities. In that letter, the Union stated "[I]t is our impression that the total of 193 minorities is less than the actual number of minorities in the union, but do not feel qualified to change the figure for the returns received, although less than half of the questionnaires were returned. If we were to take a guess, since we have received about one-half of the questionnaires, we could double the minority number reported. However, we feel that we should not do so under the circumstances" (U-313, Exhibit 5, pp. 1-2).

tions. Clearly, as non-employers of operating engineers,[7] the associations *never delegated* any part of their hiring process to the Union. Therefore, in the actual operation of the referral system, the Union personnel never performed any function that the trade associations would themselves ever have had to perform irrespective of whether the collective bargaining agreement contained a hiring-hall provision.

In light of the foregoing, there can be no basis for the conclusion that there exists as between the associations and the Union even a principal-independent contractor relationship, let alone a master-servant relationship. Moreover, since it is clear that no principal-independent contractor relationship exists between the associations and the Union, it is equally clear that the concept of non-delegable duty cannot be utilized as a basis for imposing liability against the CAEP and UCA.

### 1. Section 1981 Does Not Give Rise to a Non-Delegable Duty.

The main thrust of Respondents' arguments is that § 1981 imposes a non-delegable duty upon the Petitioner Associations such that the Union's discrimination in referral is attributable to the CAEP and UCA even if the CAEP and UCA had no knowledge or reason to know of any discrimination being practiced by the Union.[8] Section 1981 does not permit such an interpretation.

---

7. Respondents urge this Court totally to ignore the record in this case when they make the argument that associations are sometimes considered to be employers under the discrimination laws. Unfortunately for Respondents, the facts are only too clear—the associations never have employed any operating engineers. The sole function of these associations was to act as multi-employer collective bargaining representatives for some of the contractors.

8. The court below invoked *respondeat superior*, a concept based upon the relationship of master and servant, to justify its

In seeking to determine legislative intent when undertaking the task of interpreting a statute, the three factors traditionally relied upon by the judiciary are "the language and focus of the statute, its legislative history, and its purpose." *Touche Ross & Co. v. Redington*, 442 U. S. 560, 575-76 (1979), *citing Cort v. Ash*, 422 U. S. 66, 78 (1975). Nothing in the language or legislative history of § 1981 gives rise to a non-delegable duty, and when such a duty arises from a statute, that duty must be clearly expressed in the statute. Apparently, this is not enough to dissuade Respondents, who conclude without evidence of any cogent legal reasoning that § 1981 does indeed give rise to such a duty.[9]

In *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U. S. 77, 97 (1981), this Court cautioned against adding new remedies in the absence of a determi-

8. (Cont'd)

imputing vicarious liability to the trade associations. Respondents do not seriously attempt to bolster the district court's finding of liability on the basis of *respondeat superior*. Indeed, they cannot do so since, as demonstrated in these Associations' principal brief, associations do not exercise the quantum of control over the actions of Local 542 necessary to create a master-servant relationship. Instead, plaintiffs focus their attention on the asserted existence of a non-delegable duty on the part of the associations, apparently conceding thereby that Local 542 must be viewed at most as an independent contractor.

9. The language of § 1981 is not directly addressed to anyone, nor does it expressly create any duties. It speaks simply of the right of all persons to make and enforce contracts on the same basis as whites. By reference to the express terms of § 1981 then, liability may only be imposed for the denial to black persons of the right to contract on the same basis as whites. In this case there has been no finding that the associations denied to blacks this right. Only the Union was found to have denied blacks the right secured by § 1981.

nation that these remedies were contemplated by the Congress. In that case, as here, the question of liability "is entirely a creature of federal statute." [10] While the Court noted that most statutory schemes require some judicial interpretation, it stated that "the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt." [11] Since there can be no other basis whatever for holding these Petitioner Associations liable, Respondents urge this Court to read some all-encompassing non-delegable duty into § 1981. In the absence of any indication of Congressional intent in this regard, this Court must heed its admonishment in *Northwest Airlines* and not fashion such a new rule of liability for § 1981.

Even if this Court were inclined to find the equitable considerations advanced by Respondents to be compelling, this Court still cannot attach liability against the Associations by finding a non-delegable duty under § 1981. As was noted in *Northwest Airlines, supra* at 98, n. 41, those equitable considerations should be addressed to Congress rather than to the federal courts. In *United States v. Gilman*, 347 U. S. 507 (1954), a case such as this involving the interpretation of a federal statute, this Court instructed:

> [T]he claim now asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriate

10. 451 U. S. at 97.

11. *Id.*

for those who write the laws, rather than for those who interpret them.[12]

Finally, this Court has been hesitant to impose liability based on the doctrine of non-delegable duty. *See Logue v. United States*, 412 U. S. 521, 529 n. 7 (1973). In that case, the "duties" required under 18 U. S. C. § 4042 were specifically enumerated in direct contrast to the generalized right set forth in § 1981. Yet, even there a non-delegable duty was not found to have arisen.

**2. The Cases Relied Upon by the Respondents Do Not Support a Finding of Liability Against the CAEP or UCA Under the Principle of Non-Delegable Duty.**

The Respondents, by reference to a 1918 New York case and a number of civil rights cases, seek to demonstrate that the principle of non-delegable duty operates in this case to hold the associations liable even though the associations *do not themselves employ operating engineers.*[13] However, none of the cases upon which Respondents rely even remotely supports their proposition that a non-employer association can be liable for intentional discrimination practiced by a union in its referral of operators to work in the absence of the association's knowledge or reason to know of the discrimination.

In *People ex rel. Price v. Sheffield Farms-Slawson Decker Co.*, 225 N. Y. 25, 121 N. E. 474 (1918), the em-

12. 347 U. S. at 511-13.

13. As stated in the Association's initial brief, under § 1981 the CAEP and UCA have the duty not to discriminate intentionally. As the record reflects, the Associations have never attempted to shed that duty. In fact, in their limited role of employer negotiating agents, the CAEP and UCA agreed in collective bargaining to a referral-system provision which is clearly non-discriminatory on its face.

ployer was found to have violated the New York law against employing children, which law expressly imposed duties upon employers. One of the employer's drivers had seen fit to employ a child contrary to a rule the employer had promulgated, as well as the law. The court held the employer directly responsible since the violation of the law was committed by an employee (a servant). Surely, that case can have no bearing where, as here, the violation was committed by the Union, not a servant of the associations, which are not employers of operating engineers.

Respondents also seek to rely upon "Title VII and § 1981 [cases] hold[ing] employers responsible for their hiring agents' intentional discrimination" (Resp. Ind. Br. 26) for the proposition that the duty imposed by § 1981 is non-delegable. In every one of the cases cited by the Respondents the 'hiring agent' was an employee supervisor of the employer. The discrimination of the supervisor was chargeable to the employer under the principle of *respondeat superior*; non-delegable duty is not a basis of liability in any of the cases. As for the associations, the attempted imposition of liability based on these cases is so attenuated as to be ludicrous.

The cases involving the fair housing laws which Respondents cite are also wholly unsupportive of the presence of a non-delegable duty in § 1981.[14] Although some

14. There is simply no reason to assume that because of Title VIII's proscriptions against discrimination in the sale of real estate, Section 1981 creates a non-delegable duty in the area of employment. Unlike Title VIII's ban on discrimination, Section 1981's declaration against non-discrimination cannot be viewed in a vacuum. Rather, it must be read in harmony with the pervasive regulatory scheme created by the National Labor Relations Act. *See Emporium Capwell Co. v. Western Additional Community Organization*, 420 U. S. 50 (1975). When viewed in the context of the National Labor Relations Act, the employers' entering into a perfectly legal exclusive hiring hall system in the instant case

of these cases allude to the non-delegable duty principle, all of the cases involve liability of masters or principals for the intentional acts of discrimination perpetrated by their employee-servants. In not one of the cases in which non-delegable duty is mentioned is there any analysis of the concept. Rather, its existence is merely assumed in passing and, in fact, is *dicta* since the cases impute liability vicariously.

Lastly, the Fourteenth Amendment state action cases cited by Respondents are wholly inapposite. None of the cases even mentions the non-delegable duty principle, but rather are directed to the specific issue as to when the involvement of the state is sufficient for a violation of the equal protection clause contained in Section 1 of the Fourteenth Amendment to be made out. These cases have nothing whatever to do with the question of the interpretation of a federal statute—§ 1981—in order to determine whether it contains a non-delegable duty.

---

14. (Cont'd.)

cannot possibly subject their non-employer negotiating representative to liability on the theory of breach of a non-delegable duty.

In *Teamsters Local 357 v. NLRB*, 365 U. S. 667 (1961), the Supreme Court specifically rejected the NLRB's contention that hiring halls were inherently discriminatory, and approved of their use. The Court noted that hiring halls in the construction industry have long been recognized as the most economic and efficient manner of allocating jobs in a transitory work situation. 365 U. S. at 672. In fact, a union's demand for an exclusive hiring hall provision is a mandatory subject of bargaining under the NLRA. *NLRB v. Houston Chapter, Associated General Contractors of America, Inc.*, 349 F. 2d 449 (5th Cir. 1965). In view of these expressions of our national labor policy, it borders on the ridiculous to suggest that an employers' bargaining representative who enters into a bona fide hiring-hall arrangement can be held vicariously liable for the Union's acts of discrimination on the theory that Section 1981, which by its language imposes no duty on any specific individual, creates a non-delegable duty.

**B. The Hiring-Hall Was Not a Joint Enterprise.**

The Individual and Class Respondents engage in a re-drafting of the district court's opinion when they state that the district court, in the alternative, held that the hiring-hall was a joint enterprise of the Union and the contractors and the associations. To the contrary, the district court did not make any alternative holding, and never even used the term "joint enterprise." [15]

Notwithstanding the Respondents' mischaracterization of the opinion of the district court, the law that has developed in the area of "joint enterprise" clearly compels the conclusion that just as the hiring-hall cannot be said to be the agent of the CAEP and UCA, similarly, the CAEP and UCA and the Union cannot be said to have embarked upon a joint enterprise through the employers' coerced agreement to the hiring-hall system. The four elements which must all be present for a joint enterprise to exist may be found in the Restatement (Second) of Torts § 491:

> (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecu-

---

15. Respondents rely upon the case of *Stockwell* v. *United States*, 80 U. S. 531 (1879), to support their contention that the hiring-hall was a joint enterprise of the employers and the Union and which somehow included the CAEP and UCA. In fact, the business arrangement in *Stockwell* was a partnership, not a joint enterprise. As the Court stated: "By the arrangement he [Stockwell] became a partner with them in the shingle business." *Id.* at 544. Thus, Stockwell's tortious acts were attributable to his partners. Respondents have not and cannot seriously contend that the associations and the Union were partners, and therefore *Stockwell* is wholly unsupportive of their claim of the existence of a joint enterprise.

> niary interest in that purpose among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

Certainly, the requirement that there be a community of pecuniary interest between these trade Associations and the Union cannot be satisfied. The relationship between an employer's bargaining agent and union which is delineated in the National Labor Relations Act, specifically 29 U. S. C. § 158(a)(2), does not ever permit the existence of such a community of pecuniary interest. Moreover, the CAEP and UCA have no ownership interest whatever in Local 542, its hiring hall, or any of the contractor-employers who utilize it.

In addition, the CAEP and UCA have no equal right to control the actual operation of the Union's hiring-hall. In fact, the hiring hall is simply a segment of the Union.[16] It has no meaningful existence separate and apart from the Union. Indeed, the collective bargaining agreement requires employers to request referrals exclusively from the Union. In fact, there is absolutely *no* mention of a hiring hall in the collective bargaining agreement (JA. 240-47). Moreover, the record evidence is indisputably clear that the referral dispatcher, and indeed all persons with any responsibility whatever for the operation of the hiring-hall referral-system, are employees of the Union. The associations have nothing at all to do with the actual operation of the system. In fact, as non-employers of operating engineers, the associations have no need whatever to make use of the Union's hiring hall.

---

16. As even the district court acknowledged: "The plaintiffs' seek to hold the class of defendant contractors liable for the acts of the *union* in *its* hiring hall operation" (emphasis added) (PA. 169).

### C. There Exists No Relationship Supportive of Vicarious Liability.

In addition to the reasons set forth previously, the Union cannot be held to be the hiring agent of the CAEP and UCA, who themselves hire no operating engineers. As is clear from the record, these trade Associations simply do not possess the right to control the day-to-day operations of the Union's referral of workers to any or all of the 1488 contractors who were required to obtain their workers through the Local 542 dispatch system. As emphasized by this Court in *Logue, supra,* in evaluating whether an agency relationship exists the "*critical factor* . . . is the authority of the principal to control the detailed physical performance of the contractor" 412 U. S. at 528-29 (emphasis added). The petitioner in *Logue* contended that the statute involved, 18 U. S. C. § 4042, imposed "a duty on the Bureau of Prisons to provide for the safekeeping, care and subsistence of all persons . . ." *Id.* at 529. This Court noted that the county provided custody in accordance with rules and regulations of the Bureau of Prisons which specified treatment standards, discipline methods and rules on such matters as employment, visitation privileges, and attorney communications. Because of the matrix of federal rules and regulations, it was petitioner's contention that the employees of the county jail were employees of the federal government rather than employees of an independent contractor. This Court held that even though the federal government retained the right to inspect the facilities, it had no authority to "physically supervise the conduct of the jail's employees." *Id.* at 531. Similarly, although there are rules governing the operation of the hiring-hall system in this case, the associations did not have either the authority or the ability to "physically supervise the conduct of the Union's employeess" in their operation of the system.

As has been repeatedly emphasized in all of Petitioners' briefs, in order for the associations or the contractors to be vicariously liable for the discriminatory acts of the Union, there must be some evidence of a master-servant relationship as between them and the Union. The key element to such a relationship is the right to control the servant in his physical manner of performance on a day-to-day basis. The application of this well-established principle to the facts in the instant case supports but one conclusion—the Union, in discriminatorily breaching the referral-system rules, was *not* acting as a servant on behalf of either the CAEP or UCA, but at most was an independent contractor.

Moreover, the district court attempted an analysis of this right to control element *only* in *footnote 61* of its opinion (PA. 192-93). It is instructive to note that the *associations were never mentioned* in footnote 61. The element of control is examined *only* as to the *employers*. Not even the district court could find a sufficient nexus as between the associations and the Union to simply provide a basis for a discussion of the element of right to control. Absent the right to control, absent any knowledge or reason to know, and failing ever to employ any operating engineer, there simply cannot be any basis whatever for this Court to hold the CAEP or UCA liable.

## IV. The Injunctive Decree Against the Associations and Employers Is Not Authorized by the All Writs Act.

Respondents argue that the All Writs Act, 28 U. S. C. § 1651, authorized the district court to include the associations and employers in its injunctive decree.[17] The district court did not rely on nor did it mention the All Writs Act as a basis of support for its injunctive decree.

17. Petitioners CAEP and UCA incorporate herein by reference the discussion of the All Writs Act, 28 U. S. C. § 1651, contained in the Reply Brief of Bechtel Power Corporation.

The court of appeals, while it requested briefing, did not find that the All Writs Act authorized the decree.

Despite the use of the All Writs Act as a basis for compelling the assistance of the telephone company in the carrying out of a search warrant, *United States v. New York Telephone Co.*, 434 U. S. 159 (1977), the All Writs Act is not a wide-ranging license for federal courts to issue orders or writs against third parties who themselves have not engaged in wrongdoing. No case holds that the statute furnishes a district court with a substitute vehicle for imposing a remedial injunction on a party after it has found that party not to have faulted on some duty or legal obligation. By the very language of Section 1651(a), a writ or order issued under the section must be in aid of the court's jurisdiction *and* conforming to usages and principles of law. Since neither of these two prongs, as they have been developed in the third-party context, is met in the instant case, the All Writs Act is not appropriate authority for enjoining the associations and employers to perform such substantial actions.

In *New York Telephone, supra*, this Court made plain that the jurisdictional component of Section 1651(a) was met because the order against the third-party telephone company was required to prevent the court's issuance of a warrant from being a useless act. In the instant case, by contrast, there can be no question but that the district court had jurisdiction over the Union and that the order issued against the associations and employers is in no way required for the injunction against the Union to be fully operative.

Reference to this Court's careful detailing of the factors which rendered the order against the telephone company non-burdensome in *New York Telephone* demonstrates that that case provides no basis for a far-reaching remedial injunction against the associations and employers.

That injunction is clearly a burdensome intrusion upon the business operations of private associations and employers. *See Plum Creek Lumber Co. v. Hutton*, 608 F. 2d 1283 (9th Cir. 1979). Under the terms of the judgment and decree, the associations are compelled to participate in a detailed record-keeping, reporting, and compliance system under the direction and control of a court-appointed master. These injunction features have required and will require the expenditure of substantial sums of money by the associations and the employers to effect compliance. The All Writs Act plainly does not serve as a substitute for a liability finding as the basis for such an onerous order.

## CONCLUSION

In view of the foregoing, the judgment of the court of appeals as to the CAEP and UCA should be reversed and this Court should remand for entry of judgment in favor of the CAEP and UCA and for modification of the injunction so as to exclude them from its terms.

Respectfully submitted,

JOHN J. MCALEESE, JR.
THOMAS J. MCGOLDRICK
LOUIS A. MINELLA
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, PA 19004

*Attorneys for Contractors Association of Eastern Pennsylvania and United Contractors Association*
*Petitioners*

CUNNIFF, BRAY & MCALEESE
Suite 240
One Bala Cynwyd Plaza
Bala Cynwyd, PA 19004

*Of Counsel*